STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. HEALDSBURG UNION HIGH SCHOOL DISTRICT and HEALDSBURG UNION SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-68 PERB Decision No. 375 January 5, 1984
SAN MATEO ELEMENTARY TEACHERS ASSOCIATION, CTA/NEA, Charging Party, and SAN MATEO CITY SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-36 ON REMAND FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

Appearances: Suzanne C. Rawlings, Attorney (Sonoma County Office of Education) for the Healdsburg Union High School District and Healdsburg Union School District; Madalyn J. Frazzini, Maureen C. Whelan and Peter A. Janiak, Attorneys for the California School Employees Association; William E. Brown, Attorney (Brown & Conradi) for the San Mateo City School District; Kirsten L. Zerger, Attorney for San Mateo Elementary Teachers Association, CTA/NEA; Robert A. Rundstrom, Attorney (Walters & Shelburne) as Amicus Curiae for the California School Boards Association and the Association of California School Administrators; Robert A. Galgani, Attorney (Breon, Galgani, Godino & O'Donnell) for California Association of School Business Officials and the Stanislaus Employment Relations Council.

Before Gluck, Chairperson; Tovar, Jaeger, Morgenstern and Burt, Members.

DECISION

JAEGER, Member: These cases are before the Public Employment Relations Board (PERB or Board) on remand from the California Supreme Court pursuant to its order in San Mateo City School District et al. v. PERB (1983) 33 Cal.3d 850 annulling our prior decisions in Healdsburg Union High School District and Healdsburg Union School District (6/19/80) PERB Decision No. 132 and San Mateo City School District (5/20/80) PERB Decision No. 129 and remanding the cases for further consideration in light of its decision.

DISCUSSION

Procedural History

The California School Employees Association (Association or CSEA) is the exclusive representative of a unit of classified employees of the Healdsburg Union High School District and the Healdsburg Union School District (District). In the course of negotiations during 1976-77, CSEA submitted a comprehensive initial proposal. The District's representatives reviewed the document and refused to negotiate, maintaining that many of the proposals were not within the scope of representation as set forth in section 3543.2 of the Educational Employment Relations Act (EERA or Act).[1] On March 11, 1977, CSEA filed an unfair

[1]Section 3543.2 provides, in relevant part:

> The scope of representation shall be limited to matters relating to wages, hours of

practice charge alleging that the District's conduct violated subsections 3543.5(a), (b) and (c) of the Act.[2] After a hearing in the matter, the Board issued its decision in Healdsburg Union High School District, supra, in which it found

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employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

2Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

that certain of the proposals were within the scope of representation and that the District's refusal to negotiate was a violation of the Act.

The San Mateo Elementary Teachers Association, CTA/NEA (SMETA) is the exclusive representative of certificated employees of the San Mateo City School District (District). During the course of negotiations in 1976-77, the District unilaterally altered the length of the workday and the amount of preparation time and rest time afforded teachers. On December 13, 1976, SMETA filed an unfair practice charge alleging that the District violated subsection 3543.5(c) by unilaterally changing matters within the scope of representation. After a hearing on the matter, the Board issued its decision in San Mateo City School District, supra, in which it found that the District violated subsection 3543.5(c) by taking unlawful unilateral action.

The Healdsburg and San Mateo Districts and CSEA petitioned for review in the Court of Appeal, First Appellate District, pursuant to EERA subsection 3542(b). The Court of Appeal issued writs of review in all three cases. While argument was

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> employees because of their exercise of rights guaranteed by this chapter.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

heard separately in San Mateo and in the two Healdsburg cases, the court decided all three cases in a single opinion, which partially reversed the Board's determinations in Healdsburg and San Mateo.

The San Mateo District, the two Healdsburg Districts, and CSEA each filed a petition for review of the Court of Appeals' decision before the Supreme Court. The Court accepted the consolidated cases for review and issued its decision and order on May 19, 1983.

In its decision, the Supreme Court affirmed PERB's interpretation of the applicable standards for determining whether bargaining subjects not specifically enumerated in section 3543.2 are within the scope of representation and for resolving conflicts between the Education Code and EERA. It did not, however, apply these standards to the individual bargaining proposals in the Healdsburg case or the alleged unilateral changes in San Mateo, but remanded those cases to the Board for reconsideration in light of its decision. We, therefore, turn to the general standards which, in light of the Supreme Court's decision, are applicable to the resolution of the issues before us.

Scope of Representation Test

In its decision, the Supreme Court cited with approval the Board's test for determining the negotiability of subjects not specifically enumerated in section 3543.2 as established in

Anaheim Union High School District (10/28/81) PERB Decision No. 177.

Under the Anaheim test, a non-enumerated subject will be found to be within the scope of representation if: (1) it is logically and reasonably related to wages, hours or an enumerated term and condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission.

Education Code Supersession

Section 3540 provides, in relevant part:

> Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

In the underlying Healdsburg decision, the Board found that section 3540 would prohibit negotiations only where provisions of the Education Code would be "replaced, set aside, or annulled by the language of the proposed contract clause." As

the Board noted, "unless the statutory language [of the Education Code] clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of such a proposal should not be precluded."[3]

The Supreme Court specifically found that the Board's interpretation of the supersession language contained in section 3540 was correct. As the Court noted:

> PERB's interpretation reasonably construes the particular language of section 3540 in harmony with the evident legislative intent of the EERA and with existing sections of the Education Code. This, rather than the preemption theory offered by the Healdsburg Districts, is the correct approach when several provisions of state law address a similar subject. (Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 723 [166 Cal.Rptr. 331, 613 P.2d 579]; Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist. (1974) 42 Cal.App.3d 328 [116 Cal.Rptr. 819].) It is consistent with the fact that the EERA explicitly includes matters such as leave, transfer and reassignment policies within the scope of representation, even though such matters are also regulated by the Education Code. (See, Ed. Code, section 44963 et seq. [pertaining to certificated employees] and section 45105 et seq. [pertaining to classified employees].) 33 Cal.3d 850, 865.

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[3]The Board has applied this test in numerous cases since Healdsburg. See, e.g., Jefferson School District (6/19/80) PERB Decision No. 133, rev, den. 1 Civ. 50241; North Sacramento School District (12/31/81) PERB Decision No. 193; Holtville Unified School District (9/30/82) PERB Decision No. 250; Calexico Unified School District (12/20/82) PERB Decision No. 265; Mt. San Antonio Community College District (3/24/83) PERB Decision No. 297.

As a corollary to its approval of PERB's general supersession standard, the Supreme Court indicated that inclusion in a collective bargaining agreement of provisions which reaffirm statutory rights established by the Education Code would be consistent with section 3540. As the Court indicated:

> In the Healdsburg case, PERB found all proposals pertaining to layoffs and discipline which conflicted with the standards of the Education Code to be nonnegotiable. PERB did allow negotiations which might culminate in the inclusion of the terms established by the Education Code within a collectively negotiated contract. Such an agreement would not supersede the relevant part of the Education Code, but would strengthen it. 33 Cal.3d 850, 867.

Duty to Seek Clarification of Proposals

In the Healdsburg case, the District flatly refused to negotiate those portions of the Association's comprehensive initial proposal which are before us, asserting that they were outside the scope of representation. While it now concedes that many of the specific proposals contain both negotiable and nonnegotiable elements, it nevertheless asserts that it has no duty to negotiate proposals which are vague or ambiguous.

A subject is not negotiable if it is not encompassed by the language of section 3543.2, which sets forth the scope of representation under EERA. It is self-evident that, in order for an employer to reach the conclusion that a proposal concerns a subject outside the scope of representation, it must

first understand that proposal. There is, therefore, a cognizable distinction between the inability to conduct meaningful negotiations concerning proposals which are not fully understandable and an outright refusal to conduct any negotiations whatsoever. The very essence of the duty to negotiate in good faith imposed by section 3543.3 of the Act[4] is the effort to reach agreement. A refusal to address in any manner proposals which are unclear is inconsistent with the statutory obligation.

Clearly, then, it is necessary to balance an employer's duty to negotiate in good faith and its right to be adequately informed of the exclusive representative's specific negotiating interests. The resolution we find to be both practical and consistent with the give-and-take of the bargaining process is to utilize that process itself to resolve the ambiguities present in bargaining proposals. This requires the objecting party to make a good faith effort to seek clarification of questionable proposals by voicing its specific reasons for believing that a proposal is outside the scope of

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[4]Section 3543.3 provides:

> A public school employer . . . shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

representation and then entering into negotiations on those aspects of proposals which, following clarification by the other party, it finally views as negotiable. Where a proposal is arguably negotiable in whole or in part, a failure to seek clarification is, in itself, a violation of the duty to negotiate in good faith, and will result in an order requiring the objecting party to return to the negotiating table and seek clarification of the ambiguous proposal.

We do not suggest that the objecting party must wrestle to a fall with every ambiguity, or search out every negotiable or objectionable word or phrase. But its efforts must be consonant with the legislative intent that negotiations serve as a method of improving personnel management and communication between employees and their public school employers.

Finally, the District's contention that, by imposing this requirement on the employer, we are expanding the scope of representation misinterprets our action. The process of clarification does not compel the employer to engage in substantive negotiations on any subject not mandated by the Legislature.

I.

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The Districts concede that they refused to negotiate those proposals which are before the Board. Therefore, the only

issue in the case is whether the specific proposals are within the scope of representation. Where we find the Association's proposals to be negotiable, the Districts' refusal to negotiate constitutes a violation of subsection 3543.5(c) and, concurrently, subsections 3543.5(a) and (b). San Francisco Community College District (10/12/79) PERB Decision No. 105.

The Contract Proposals

Article II. No Discrimination

2.1 Discrimination Prohibited; No employee in the bargaining unit shall be appointed, reduced, removed, or in any way favored or discriminated against because of his/her political opinions or affiliations, or because of race, national origin, religion or marital status and, to the extent prohibited by law, no person shall be discriminated against because of age, sex, or physical handicap.

2.2 No Discrimination on Account of CSEA Activity; Neither the District nor CSEA shall interfere with, intimidate, restrain, coerce, or discriminate against employees because of the exercise of rights to engage or not to engage in CSEA activity.

Proposals relating to categorical forms of discrimination (e.g., race, national origin, political affiliation) and to discrimination on the basis of union activity have a direct relationship to a whole range of enumerated subjects of bargaining. Discriminatory practices may affect wages, transfer, reassignment and disciplinary policies, and other areas of bargaining enumerated in section 3543.2 of the Act. For example, an employer may decide to transfer an employee because of race or sex or discipline an employee who legitimately takes time to participate in a union function.

Thus, in our view, proposals 2.1 and 2.2 are logically and reasonably related to enumerated subjects of bargaining and, therefore, meet the threshold requirement of the Anaheim test.

The District argues that, because certain state and federal statutes cover the area of discrimination, the collective bargaining process is not the appropriate means of resolving disputes in this area.[5] Hence, it asserts that proposals 2.1 and 2.2 run afoul of the second prong of the Anaheim test. We disagree.

The courts have consistently held that the existence of comprehensive legislation prohibiting both categorical discrimination and discrimination for union activity does not preclude enforcement of those rights through the collective bargaining process. See, e.g., Packinghouse Workers v. NLRB (D.C. Cir. 1969) 416 F.2d 1126 [70 LRRM 2489], Emporium Capwell v. Western Addition Community Organization (1975) 420 U.S. 50 [88 LRRM 2660], Steel Workers v. Weber (1979) 443 U.S. 193 [99 S.Ct. 2721] (racial discrimination); U.S. Industries (1978) 234 NLRB No. 49 [97 LRRM 1234] (discrimination for union activity). As the Supreme Court noted in Alexander v. Gardner-Denver Co. (1973) 415 U.S. 36, 59-60:

5See, for example, the Equal Employment Opportunity Act, 42 United States Code section 2000e-2 and the Fair Employment Practices Act, California Labor Code section 1410 et seq., prohibiting discrimination in employment, and the EERA section 3543.5, prohibiting discrimination against employees for participation in union activities.

> We think . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII.

In our view, there is at least as strong a policy favoring private resolution of disputes in EERA as there is in the National Labor Relations Act (NLRA). See Anaheim City School District (12/14/83) PERB Decision No. 364. Thus, incorporation of protections against discrimination in a collective bargaining agreement furthers the "improvement of personnel management and employer-employee relations within the public school systems." (Section 3540.) Indeed, dispute resolution at the local level through mutually bargained procedures can provide a faster, more efficient, less costly and less disruptive means of settling disputes in this area. At the same time, incorporation of "no discrimination" or "affirmative action" language in an agreement does not preclude an employee from pursuing other remedies before federal or state agencies or through the courts. Finally, should a proposal seek to violate or in effect violate state law, the proposal would be unlawful and therefore out of scope. The Board, therefore, concludes that the collective bargaining process is an appropriate forum in which conflicts over discrimination in employment may be addressed and resolved.

The Board finds that the requirement to negotiate the inclusion of contractual provisions prohibiting discrimination merely reiterates management's existing obligations under state and federal law and, therefore, does not invade any managerial prerogative. Thus, we conclude that proposals 2.1 and 2.2 are negotiable under the Anaheim test.

2.3 Affirmative Action: The District and CSEA agree that an effective affirmative action program is beneficial to the District, employees, and the community. The parties agree and understand that the responsibility for an affirmative action plan rests with the employer. The District shall consult with CSEA in preparing the affirmative action plan and further agrees that no provision shall be adopted in the affirmative action plan that violates employee rights as set out in this agreement.

This proposal seeks to permit the Association to consult with the District concerning the preparation of an affirmative action plan. In addition, it requires the District to provide assurances that the plan will not violate the rights that employees have previously obtained through the collective bargaining process. The District contends that proposal 2.3 is an illegal intrusion into its managerial prerogatives.

An exclusive representative has a right to negotiate any aspect of an affirmative action plan which affects matters within the scope of representation. Clearly, therefore, the right to negotiate these matters necessarily includes the lesser right to meet and consult over matters within the scope of representation. Hence, CSEA's proposal that the District consult with the Association concerning an affirmative action

plan is within the scope of representation as set forth in section 3543.2.

As noted above, the federal courts have found that, under the NLRA, the exclusive representative may enter into an agreement which establishes the affirmative action policy of the employer. Indeed, these cases indicate that there is a strong federal policy favoring such agreements. Steel Workers v. Weber, supra; W.R. Grace & Co. v. Local 759, Rubber Workers (1983) ____ U.S. ____, [76 L.Ed2d 298]. We have found that policy equally applicable to EERA.

We note, however, that a requirement that an employer enter into negotiations or consultations over the in-scope elements of an affirmative action plan with the exclusive representative does not mean that the parties may agree to violate applicable federal and state statutes. The NLRB and the federal courts have long held that a contractual agreement which imposes discriminatory practices is unlawful (Hughes Tool Co. (1964) 147 NLRB 1573 [56 LRRM 1289] (racial discrimination), Gay Paree Undergarment Co. (1950) 91 NLRB 1363 [27 LRRM 1006] (discrimination for union activity)), and is in violation of an exclusive representative's duty of fair representation (Hughes Tool Co., supra; Bell & Howell Co. (D.C. Cir. 1977) 598 F.2d 136 [100 LRRM 2192]). In accord, Rocklin Teachers Professional

Association (Romero) (3/26/80) PERB Decision No. 124.[6]

The final sentence of proposal 2.3 protects the Association and bargaining unit members from the imposition of unilateral changes of matters within the scope of representation which might result from the implementation of an affirmative action plan. This language merely reiterates the long-established labor law principle that an employer may not unilaterally alter negotiable terms and conditions of employment without negotiating. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; San Francisco Community College District, supra; Grant Joint Union High School District (2/26/82) PERB Decision No. 196; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Such language may properly be included in a collective agreement.

We, therefore, conclude that Article II is negotiable in its entirety.

Article V. Organizational Rights

5.1 CSEA Rights; CSEA shall have the following rights in addition to the rights contained in any other portion of this Agreement:

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[6]We also disagree with the position articulated in Member Tovar's concurrence and dissent that the area of affirmative action is covered by comprehensive legislation which supersedes the right of employees to negotiate or consult over such issues. While Education Code sections 44100 and 87100 require each school and community college district to establish an affirmative action plan, they do not, in our view, create an "inflexible standard" which conflicts with the duty to negotiate or consult over the in-scope contents of the plan.

5.1.1 Access to Work Areas; The right of access at reasonable times to areas in which employees work.

5.1.2 Use of Mail System, Bulletin Board; The right to use without charge institutional bulletin boards, mailboxes, and the use of the school mail system and other District means of communication for the posting or transmission of information or notices concerning CSEA matters.

5.1.3 Use of Equipment, Facilities Without Charge; The right to use without charge institutional equipment, facilities, and buildings at reasonable times.

CSEA's first three organizational rights proposals are intended to guarantee to the exclusive representative reasonable access to District employees, facilities, and equipment. In the main, they incorporate the statutory access provisions set forth in subsection 3543.l(b).[7] As noted in Jefferson School District, supra, "access is a necessary prerequisite for adequately representing grievants" and, therefore, bears a logical relationship to the grievance procedure. Indeed, access proposals relate to, and facilitate, the ongoing collective bargaining process. We, therefore, find that these proposals are related to enumerated subjects in section 3543.2 and meet the threshold requirement of the Anaheim test.

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[7]Subsection 3543.l(b) provides:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

Conflict will surely arise between the parties unless both sides have an understanding of the exclusive representative's access to the District's employees, communication systems, and facilities.

The District contends that subsection 3543.l(b) was intended by the Legislature to preempt the area of access and thus makes the above provisions nonnegotiable. The District's contention is an extension of the argument it made before the Supreme Court that it is inappropriate to include rights established by the Education Code in a collective agreement. As noted supra, the Court specifically rejected this argument, finding that inclusion of ". . . terms established by the Education Code within a collectively negotiated contract . . . would not supersede the Education Code but would strengthen it." San Mateo City School District et al. v. PERB, supra, 33 Cal.3d 850, 866.

We similarly find that inclusion in a collective bargaining agreement of statutory rights established by EERA—such as the right to access or release time—does not "replace or set aside" those provisions of the Act, but augments and reinforces them. As the Board noted in Anaheim Union High School District, supra, at p. 11, the Legislature placed these rights in separate sections of the Act because they concerned matters "too important to the statutory scheme to be left either to the employer's discretion or entirely to the vagaries of

negotiations." (Emphasis in the original). By so doing, however, the Legislature did not intend to prohibit the parties from including these statutory protections in a collective bargaining agreement. On the contrary, the inclusion of statutory rights in a collective bargaining agreement strengthens the legislative purpose by providing a contractual remedy for violation of those rights.

The District also argues that the use of the word "equipment" in proposal 5.1.3 expands the right of access beyond what the Legislature intended in enacting subsection 3543.l(b).

We disagree with the District's contention that access to "equipment" is, on its face, beyond the rights established by subsection 3543.l(b). In interpreting subsection 3543.l(b), the Board has consistently held that, by providing for a right of access to "other means of communication" besides those explicitly set forth in the subsection, the Legislature did not intend those explicitly cited means of access to be exhaustive. See, e.g., Richmond Unified School District/Simi Valley Unified School District (8/1/79) PERB Decision No. 99 (finding internal mail system to be "other means of communication"). While we do not disagree with the District that the Association's proposal is ambiguous and may contemplate an unlawful extension of the right to access, we cannot find it facially nonnegotiable. The District is under

an obligation to seek clarification of the proposal so as to determine what the Association means by the term "equipment" and whether it falls within the lawful forms of access established by subsection 3543.l(b).

For the foregoing reasons, we find proposals 5.1.1, 5.1.2, and 5.1.3 negotiable.

5.1.4 Right to Review Employee Records with Employees' Permission; The right to review employees' personnel files and any other records dealing with employees when accompanied by the employee or on presentation of a written authorization signed by the employee.

5.1.5 Right to "Hire Date" Seniority Roster; The right to be supplied with a complete "hire date" seniority roster of all bargaining unit employees on the effective date of this agreement and every three (3) months thereafter. The roster shall indicate the employee's present classification and primary job site.

5.1.9 Right to Review District Material Necessary for CSEA to Fulfill Role as Exclusive Rep; The right to review at all reasonable times any other material in the possession of or produced by the District necessary for CSEA to fulfill its role as the exclusive bargaining representative.

Provisions to review employee records, be supplied with seniority lists, and review other material necessary for the fulfillment of CSEA's role as the exclusive bargaining representative are related to the grievance procedure and, inasmuch as the outcome of a grievance may impact wages, hours, transfers, and discipline of employees, are related to those bargaining subjects as well. Seniority lists similarly impact a whole range of negotiable subjects, and the availability of such lists is critical both for the individual employee and the

exclusive representative in determining the employer's good faith compliance with many clauses in the negotiated agreement.

The records referred to in the proposals are in the possession of the District, and we find that the most appropriate way to avoid conflict over access to necessary information is to regulate the Association's access to that information through the collective bargaining process.

We note that proposal 5.1.9 is somewhat ambiguous. However, as discussed, supra, the District has the duty to seek clarification prior to a legitimate refusal to negotiate on the subject. Thus, to the extent that all of the above-cited provisions are necessary for CSEA to fulfill its role as exclusive representative, participate in negotiations, effectuate the grievance procedure, and administer the contract, we find them negotiable.

5.1.6 Right to 2 Copies of Written Reports to Government: The right to receive upon request two *(2)* copies of any and all written reports submitted to any other governmental agency.

5.1.7 Right to 2 Copies of Grant Applications; The right to receive two (2) copies of all applications to any other governmental agency for any grant, funding, or approval of any kind when such grant, funding, or approval can reasonably be expected to have an impact, direct or indirect, on the classified service; and said copies shall be forwarded to CSEA in the same manner and at the same time as the subject matter is submitted for consideration to the public school employer. No action on such matters shall be taken by the employer until CSEA has been provided the opportunity to review and comment.

5.1.8 Right to 2 Copies of Budget or Financial Material; The right to receive two (2) copies of any budget or financial material submitted at any time to the governing board.

The Board has long held that an employer, as part of its duty to negotiate in good faith, has an obligation to supply information to the exclusive representative. However, the information requested must be both directly related to the union's function as bargaining representative and "reasonably necessary" for the performance of that function. Stockton Unified School District (11/3/80) PERB Decision No. 143; Mt. San Antonio Community College District (6/30/82) PERB Decision No. 224; Oakland Unified School District (7/11/83) PERB Decision No. 326; Otis Elevator Co. (1968) 170 NLRB 395 [67 LRRM 1475].

While the documents sought in proposals 5.1.6, 5.1.7 and 5.1.8 might, at some future point, be reasonably necessary to the function of the exclusive representative, we cannot find them so in the absence of an evidentiary record justifying access. The request, therefore, constitutes a premature invasion of the District's prerogative to plan, study and consider grant proposals, government reports or budget proposals prior to interjecting them into the bargaining relationship between the parties. Since the documentation sought is not, at this stage, relevant to the Association's concerns, the collective bargaining arena is not the appropriate forum in which to settle disputes concerning these documents. For the foregoing reasons, we find proposals 5.1.6, 5.1.7 and 5.1.8 nonnegotiable.

5.1.10 Release Time for CSEA State Officers to Conduct Necessary Business; The right of release time for employees who are CSEA state officers to conduct necessary CSEA business.

5.1.11 Release Time for CSEA Delegates to Attend Conference; The right of release time for CSEA chapter delegates to attend the CSEA Annual Conference, with the District to provide $250 in conference expenses for each delegate.

5.1.12 Right to Contract Orientation of Unit Employees During Working Hours; The right to conduct orientation sessions on this agreement for bargaining unit employees during regular working hours.

In proposals 5.1.10 and 5.1.11, CSEA seeks release time for its state delegates to conduct necessary business and for chapter delegates to attend CSEA's annual conferences. While EERA specifically grants representatives of employee organizations release time, it does so for the purposes of meeting and negotiating and for processing grievances (subsection 3543.1(c)). The negotiability of these proposals, however, does not depend on this statutorily defined release time provision. We find these proposals negotiable because they directly concern hours of employment, which is specifically enumerated in section 3543.2. See Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96 and the cases cited therein.

However, the Board finds that the $250 stipend provision of proposal 5.1.11 is not negotiable under the Anaheim test. The payment is not related to wages or any other enumerated item and, therefore, fails the threshold requirement outlined in Anaheim. Indeed, such a payment might well run afoul of the

prohibition against "unlawful support and domination" of an employee organization. (Subsection 3543.5(d).)

For the foregoing reasons, the Board finds the release time provisions of proposals 5.1.10, 5.1.11 and 5.1.12 negotiable, with the exception of the $250 stipend request set forth in proposal 5.1.11.

5.2 Prohibition Against Advisory Committees; The District shall not form or cause to be formed any advisory committee on any matter concerning bargaining unit employees without the consent of CSEA.

This proposal, on its face, bears no logical and reasonable relationship to a negotiable subject. Rather, it prohibits the District from creating any advisory committee which might consider "any matter concerning bargaining unit employees." Certainly, it is conceivable that an advisory committee might be formed which, in the broadest sense, "concerns" bargaining unit members but which has no relation to the subjects of bargaining enumerated in section 3543.2. In addition, the language of the proposal is so broad that it could interfere with the District's prerogative to establish management committees on bargaining issues. We, therefore, find that this proposal does not meet the requirements of the Anaheim test and is nonnegotiable.

5.3 Restriction on District Negotiations and Agreements; The District shall conduct no negotiations nor enter into any agreement with any other organization on matters concerning the rights of bargaining unit employees and/or CSEA without prior notice to and approval by CSEA of the negotiations and the agreement.

Proposal 5.3 does not suffer from the same infirmity as the previous proposal. Assuming that the terms "negotiations" and "other organizations" used in the proposal are intended as terms of art within the labor relations context, the proposal merely reiterates the statutory right of CSEA to act as the exclusive representative of bargaining unit members. Essentially, therefore, it incorporates the rights established by subsection 3543.1(a) and section 35438 of the Act into the contract. As noted above, we find that the incorporation of the statutory protections of the Act in the collective bargaining agreement is permissible. To the extent that the language of the proposal is somewhat ambiguous, as the District claims, it is not fatally so, and the District has a duty to seek clarification before it may lawfully refuse to negotiate. We, therefore, find proposal 5.3 negotiable.

8Subsection 3543.l(a) provides, in relevant part:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers. . . .

Section 3543 provides, in relevant part:

> Public school employees shall have the right . . . to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

5.4 Distribution of the Contract: Within thirty (30) days after the execution of this contract, the District shall print or duplicate and provide without charge a copy of this contract to every employee in the bargaining unit. Any employee who becomes a member of the bargaining unit after the execution of this agreement shall be provided with a copy of this agreement by the District without charge at the time of employment. Each employee in the bargaining unit shall be provided by the District without charge with a copy of any written changes agreed to by the parties to this agreement during the life of this agreement.

This proposal seeks to place the financial burden of the reproduction and distribution of the contract on the District. We find that the proposal has far too tenuous a relationship to the enumerated subjects of section 3543.2 to satisfy the threshold test of the Anaheim decision and is, therefore, nonnegotiable.

5.5 Management Orientation: District Management shall conduct orientation sessions on this agreement for Management, Supervisory and Confidential employees.

We find this proposal to be nonnegotiable on its face. A requirement that an employer provide orientation sessions for employees excluded from the bargaining unit impermissibly interferes with management's right to direct its managerial, confidential, and supervisory employees.

Article VI. Job Representatives

6.1 Purpose: The District recognizes the need and affirms the right of CSEA to designate Job Representatives from among employees in the unit. It is agreed that CSEA in appointing such representatives does so for the purpose of promoting an effective relationship between the District and employees by helping to settle problems at the lowest level of supervision.

6.2 Selection of Job Representatives. CSEA reserves the right to designate the number and the method of selection of Job Representatives. CSEA shall notify the District in writing of

the names of the Job Representatives and the group they represent. If a change is made, the District shall be advised in writing of such change.

6.3 Duties and Responsibilities of Job Representatives; The following shall be understood to constitute the duties and responsibilities of Job Representatives:

6.3.1 After notifying his/her immediate superior, a Job Representative shall be permitted to leave his/her normal work area during reasonable times in order to assist in investigation, preparation, writing, and presentation of grievances. The Job Representative shall advise the Supervisor of the grievant of his/her presence. The Job Representative is permitted to discuss any problem with all employees immediately concerned, and, if appropriate, to attempt to achieve settlement in accordance with the grievance procedure.

6.3.2 If, due to an emergency, an adequate level of service cannot be maintained in the absence of a Job Representative at the time of the notification mentioned in 6.3.1, the Job Representative shall be permitted to leave his/her normal work area no later than two hours after the Job Representative provides notification.

6.3.3 A Job Representative shall be granted release time with pay to accompany a CAL-OSHA representative conducting an on-site, walk-around safety inspection of any area, department, division, or other subdivision for which the Job Representative has responsibilities as a Job Representative.

6.4 Authority: Job Representatives shall have the authority to file notice and take action on behalf of bargaining unit employees relative to rights afforded under this agreement.

6.5 CSEA Staff Assistance: Job Representatives shall at any time be entitled to seek and obtain assistance from CSEA Staff Personnel.

Article VI sets forth the duties and responsibilities of CSEA's job representatives. As the U.S. Supreme Court noted in Conley v. Gibson (1957) 335 U.S. 41, 46 [41 LRRM 2089]:

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

It is the job representatives or union stewards who, through their participation in the grievance process and other related duties, have a central role in the day-to-day administration and enforcement of the collective bargaining agreement. Article VI, therefore, relates directly to both the grievance procedure and the hours and wages of the stewards themselves. Since job stewards often perform their duties during periods of stress between management and its employees, the bilateral negotiating process is particularly well suited to determining their role. We further find that no managerial prerogative is invaded by permitting the parties to define the role of the union stewards through the collective bargaining process. For the above stated reasons, we find Article VI negotiable in its entirety.

Article X. Employee Expenses and Materials

10.1 Uniforms; The District shall pay the full cost of the purchase, lease, rental, cleaning and maintenance of uniforms, equipment, identification badges, emblems and cards required by the District to be worn or used by bargaining unit employees.

10.2 Tools;

10.2.1 The District agrees to provide all tools, equipment, and supplies reasonably necessary to bargaining unit employees for performance of employment duties.

10.2.2 Safe Place to Store Tools; Notwithstanding Section 10.2.1, if an employee in the bargaining unit provides tools or equipment belonging to the employee for use in the course of employment, the District agrees to provide a safe place to store the tools and equipment and agrees to pay for any loss or damage or for the replacement cost of the tools resulting from normal wear and tear.

10.3 Replacing or Repairing Employee's Property; The District shall fully compensate all bargaining unit employees for loss or damage to personal property in the course of employment.

10.5 Non-owned Automobile Insurance; The District agrees to provide the primary personal injury and property damage insurance to protect employees in the event that employees are required to use their personal vehicles on employer business.

The above cited proposals concern job-related employee expenses, including the purchase and maintenance of uniforms, tools, employee property and automobile insurance.

The District contends that the term "wages" should be construed to mean only hourly, weekly or piece work compensation and that the forms of compensation set forth in the Association's proposal are nonnegotiable. We disagree. From the earliest days of the National Labor Relations Act, wages have been defined as including other forms of compensation besides those which are purely monetary in nature.[9] We have followed the definition of wages employed by the NLRB and the federal courts in a number of cases (see, e.g., Oakland Unified School District, PERB Decision No. 236, supra (annuity accounts), Oakland Unified School District

[9]See, e.g., Abbot Worsted Mills, Inc. (1st Cir. 1942) 127 F.2d 430 [10 LRRM 590], W.T. Carter & Brother (1950) 90 NLRB 2020 [26 LRRM 1427], Lehigh Portland Cement Co. (1952) 101 NLRB 1010 [31 LRRM 1097] (employee housing); Weyerhouser Timber Co. (1949) 87 NLRB 672 [25 LRRM 1163], Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829], Ford Motor Co. v. NLRB (1979) 441 U.S. 488 [101 LRRM 2222] (food); W.W. Cross & Co. v. NLRB (1st Cir. 1949) 174 F.2d 875 [24 LRRM 2068], General Motors Co. (1949) 81 NLRB 779 [23 LRRM 1442] (health, welfare and insurance plans); National Broadcasting Co. (1980) 252 NLRB 187 [105 LRRM 1304] (income savings plans); Lehigh Portland Cement Co., supra (uniforms, laundry, travel, gloves, entertainment, and other "emoluments of value" gained in the course of employment).

(4/23/80) PERB Decision No. 126, aff'd 120 Cal.App.3d 1007, Pajaro Valley Unified School District, supra (insurance), San Francisco Community College District, supra (leave)), and reaffirm that interpretation of the statutory term "wages" today. We find that work-related expenses, uniforms, tools, and other materials are "wages" within the meaning of section 3543.2. Thus, they are negotiable.

10.7 Employee Achievement Awards; The District agrees to provide a regular program of monetary awards for valuable suggestions, services, or accomplishments to bargaining unit employees under the provisions of Education Code Sections [sic] 12917 or its successor. The District agrees to develop the program through consultation with CSEA.

Proposal 10.7 proposes to include in the contract a provision whereby the Association will have consultation rights concerning a system of monetary awards authorized by Education Code section 44015.10 The District contends that the monetary awards are "gifts" rather than "compensation" and, in addition, that the right of employees to negotiate such awards

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[10]Education Code section 44015 provides:

> The governing board of a school district may make awards to employees who:
>
> (a) Propose procedures or ideas which thereafter are adopted and effectuated, and which result in eliminating or reducing district expenditures or improving operations; or
>
> (b) Perform special acts or special services in the public interest; or

is superseded by the Education Code's inflexible standard. We find both contentions to be without merit.

As noted above, we follow the NLRB definition of wages as "emoluments of value" gained in the course of employment. The compensation contemplated in section 44015 is awarded for "special services and superior accomplishment" and not subject to the discretion of the employer but regulated by "rules and regulations." We, therefore, find that the system of awards is

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> (c) By their superior accomplishments, make exceptional contributions to the efficiency, economy or other improvement in operations of the school district.
>
> Before any such awards are made, the governing board shall adopt rules and regulations. The board may appoint one or more merit award committees made up of district officers, district employees, or private citizens to consider employee proposals, special acts, special services, or superior accomplishments and to act affirmatively or negatively thereon or to provide appropriate recommendations thereon to the board.
>
> Any award granted under the provisions of this section which may be made by an awards committee under appropriate district rules, shall not exceed two hundred dollars ($200), unless a larger award is expressly approved by the governing board.
>
> When an awards program is established in a school district under the provisions of this section, the governing board shall budget funds for this purpose but may authorize awards from funds under its control whether or not budgeted funds have been provided or the funds budgeted are exhausted.

compensation for meritorious ideas, service, and accomplishment. The achievement awards are, therefore, "wages" within the meaning of the Act, and negotiable.[11]

We also find no merit in the District's supersession argument. In our view, nothing in Education Code section 44015 is inconsistent with the participation of the exclusive representative in establishing a system of awards for "special service or superior accomplishment." In fact, the statute permits the governing board to "adopt rules and regulations with the aid and participation of employees." CSEA's proposal merely indicates an interest in participating in the setting of those "rules and regulations." We find that CSEA's legitimate interest and request to participate is not precluded by the requirements of Education Code section 44015.

10.8 Hold Harmless Clause; Whenever any civil or criminal action is brought against an employee for any action or omission arising out of or in the course of the duties of that employee, the District agrees to pay the costs of defending such action, including costs of counsel and of appeals, if any, and shall hold harmless from and protect such employee from any financial loss resulting therefrom.

Proposal 10.8 attempts to secure for the employees protection from financial loss arising out of civil or criminal actions initiated against employees because of actions or omissions in the course of their duties.

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[11]Because we find that the proposal concerns wages we make no determination here as to the negotiability of the subject of gifts.

This financial benefit is related to wages and, therefore, meets the requirements of the first step of the Anaheim test. Disputes as to economic benefits are best left to the bilateral bargaining process, and no management prerogative is unduly invaded by the bargaining requirement.

The District contends that the "Hold Harmless" clause is superseded by the indemnity regulation of Government Code section 825 12 and is nonnegotiable. While we agree with the

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[12]Government Code section 825 provides:

> If an employee or former employee of a public entity requests the public entity to defend him against any claims or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.
>
> If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the right of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission

District's assertion that Government Code section 825 establishes an inflexible standard concerning a public entity's obligation to indemnify employees, we disagree with its assertion that proposal 10.8 is nonnegotiable on its face.

Government Code section 825 provides for indemnification of employees for any claims arising "from an act or omission occurring within the scope of . . . employment." (Emphasis added.) The Association's proposal, while largely paralleling the rights established by Government Code section 825, requires indemnification "for any action or omission arising out of, or in the course of the duties of [an] employee." (Emphasis added.)

> occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.
>
> Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.
>
> If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

To the extent that the Association's proposal would extend the employer's liability beyond that which is contemplated by Government Code section 825, it is nonnegotiable. However, we cannot say that, on its face, the Association's proposal would enlarge the District's liability beyond that which the Legislature intended in enacting Government Code section 825. Therefore, we conclude that the proposal is ambiguous, and that the District is obligated to seek clarification of the Association's proposal with the intention of making it fully consistent with rights and obligations established by Government Code section 825.13

Article XI. Rights of Bargaining Unit Upon Change in School Districts

11.1 Rights of Bargaining Unit: Any division, uniting, unification, unionization, annexation, or merger or deunification, or change of District boundaries or organization shall not affect the rights of individual bargaining unit employees under this Agreement, nor alter the exclusive representation standing of CSEA. This Agreement shall be binding upon any new governing board resulting therefrom, which employs employees currently a part of the bargaining unit during the term of this Agreement.

It is self-evident that this proposal is intended to preserve the unit members' negotiated wages, hours and conditions of employment and to preserve CSEA's status as exclusive representative in the event one of the described

[13] We note that section 825 specifically provides that under the Higher Education Employer-Employee Relations Act (HEERA) conflicts between the statute and memorandum of understanding will be resolved in favor of the memorandum.

changes occurs in the employer entity. We find that element of the Association's proposal, which requires a successor entity to be bound by the terms of a pre-existing collective bargaining agreement, nonnegotiable.

Whether or not the structural changes enumerated in the proposal would result in the creation of a new and different employer, each raises a strong possibility that the successor will find it necessary to alter the structure of the enterprise, reorganize its managerial and supervisory configuration, and reorganize the work force and its tasks. The opportunity to meet these requirements, which would be essential to fulfilling the successor's mission, would be significantly abridged by the obligation to accept contract terms which were negotiated under substantially different conditions. See NLRB v. Burns Int'l Detective Agency, Inc. (1972) 406 U.S. 272. The District cannot be required to negotiate on a proposal which would bind itself or its successor and preclude either from exercising its essential prerogatives. In so holding, we do not imply that a district, as a consequence of some limited reorganization, may automatically abort its current contractual obligations or refuse to continue to recognize the existing exclusive representative. The resolution of disputes arising out of such actions must be based upon the particular factual circumstances of the case.

However, Education Code section 4511814 does require that employees' wages, leaves and other benefits be preserved for a period of time and in the manner prescribed by the Code. We, therefore, conclude that, to the extent that the proposal seeks to incorporate this section of the Education Code, it is a proper subject for negotiations.

The proposal to require the continuation of CSEA's exclusive representational status relies in part on a misplaced concept of the current employer's authority. An organization's right to act as exclusive representative is based on its majority status among unit employees (see EERA section 3544), and CSEA's certification was predicated on its having achieved majority status among bargaining unit members. Whether CSEA could qualify to enjoy that status in the event of the creation of a different employing entity can only be determined by its status at that time. Because this proposal seeks to impose on the present employer the obligation to negotiate concerning an

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[14]Education Code section 45118 provides in part:

> Any division, uniting, unionization, annexation, merger, or change of school district boundaries shall not affect the rights of persons employed in positions not requiring certification qualifications to continue in employment for not less than two years and to retain the salary, leaves and other benefits which they would have had had the reorganization not occurred, and in the manner provided in this article. . . . (Emphasis added.)

event whose nature is unpredictable, over which it has no control, and concerning which it cannot in good faith commit itself, we find it nonnegotiable.

In summary, we find that Article XI is negotiable only to the extent that it seeks to incorporate in the agreement the pertinent provisions of section 45118 of the Education Code.

Article XVII. Hiring

17.1 Short-Term Employees;

17.1.1 Persons hired for a specific temporary project of limited duration which when completed shall no longer be required shall be classed as short-term employees.

17.1.2 The District shall notify CSEA in writing of any proposed hiring of short-term employees and shall indicate the project for which hired and the probable duration of employment at least ten (10) days prior to the employment. CSEA shall be notified in writing immediately of any change in employment status, nature of project, or duration of project affecting such employees.

17.1.3 No employee shall fill a short-term position or positions for more than 126 working days in any twelve (12) consecutive months.

17.1.4 No employee serving in a short-term position for 126 days in any twelve (12) consecutive months shall be employed in any capacity by the district for a period of six (6) months after the completion of the 126-day period.

17.1.5 If a short-term position is utilized for more than 126 days, the position shall become a bargaining unit position.

Although this proposal relates to wages and hours, the employees for whom CSEA seeks to negotiate are outside the bargaining unit which it represents. CSEA is certified as the exclusive representative of the classified employees. Section

4510315 of the Education Code expressly excludes "short-term" employees from the classified service. Hence, these proposals do not concern positions over which CSEA has authority to negotiate. The Board, therefore, finds that proposals 17.1.1 through 17.1.5 are nonnegotiable.

17.2 Restricted Employees; A restricted employee shall become a regular employee after completing 126 working days service and fulfilling any requirements imposed on other persons serving in the same class as regular employees. The District shall provide restricted employees with an opportunity to meet any requirements imposed on other persons serving in the same class as regular employees. On becoming a regular employee the restricted employee shall be considered a regular employee as of the initial date of employment for the purpose of all benefits of employment except bargaining unit seniority. The bargaining unit seniority rights of such an employee shall commence as of the 127th work day in the position, and the employee shall be immediately subject to the organizational security provisions in this agreement.

Unlike the previous proposal, CSEA's proposal with respect to restricted employees is not an attempt to negotiate on behalf of employees which it does not represent. Education Code section 4510516 explicitly provides that restricted

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[15]Section 45103 provides, in part:

> Substitute and short-term employees, employed and paid for less than 75 percent of a school year, shall not be part of the classified services.

[16]Education Code section 45105 provides, in relevant part:

> Notwithstanding the provisions of subdivision (a), if specifically funded positions are restricted to employment of persons in low-income groups, from designated impoverished areas and other criteria which restricts the privilege of

employees "shall be classified for all purposes" except in four specifically enumerated situations. As noted above, CSEA represents only classified employees.

The Association's proposal seeks to subject restricted employees to both the seniority and organizational security

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> all citizens to compete for employment in such positions, all such positions shall, in addition to the regular class title, be classified as "restricted." Their selection and retention shall be made on the same basis as that of persons selected and retained in positions that are a part of the regular school program, . . .
>
> . . . . . .
>
> (2) Persons employed in positions properly classified as "restricted" shall be classified employees for all purposes except:
>
> (A) They shall not be accorded employment permanency under Section 45113 or Section 45301 of this code, whichever is applicable.
>
> (B) They shall not acquire seniority credits for the purposes of Sections 45298 and 45308 of this code or, in a district not having the merit (civil service) system, for the purposes of layoff for lack of work or lack of funds as may be established by rule of the governing board.
>
> (C) The provisions of Sections 45287 and 45289 shall not apply to "restricted" employees.
>
> (D) They shall not be eligible for promotion into the regular classified service or, in districts that have adopted the merit system, shall not be subject to the provisions of Section 45241, until they have complied with the provisions of subdivision (c).

provisions of the agreement. The District does not deny that both seniority and organizational security arrangements are negotiable subjects of bargaining, but asserts that the particular proposal submitted by CSEA conflicts with and is, therefore, superseded by Education Code section 45105. We disagree. In our view, CSEA's proposal does not, on its face, fatally conflict with the Education Code. To the extent that the proposal paraphrases Education Code subsection 45105(c),[17] and attempts to secure retroactive seniority accrual for purposes not precluded by the statute, such as wage increases or health and welfare benefits, we find no conflict.

The Board, therefore, finds proposal 17.2 negotiable.

17.3 Substitute Employees; An employee employed as a substitute for more than 100 working days in any six (6) month period shall be deemed a regular employee on the first working

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[17]Subsection 45105(c) provides:

> (c) At any time, after completion of six months of satisfactory service, a person serving in a "restricted" position shall be given the opportunity to take such qualifying examinations as are required for all other persons serving in the same class in the regular classified service. If such person satisfactorily completes the qualifying examination, regardless of final numerical listing on an eligibility list, he shall be accorded full rights, benefits and burdens of any other classified employee serving in the regular classified service. His service in the regular classified service shall be counted from the original date of employment in the "restricted" position and shall continue even though he continues to serve in a "restricted" position.

day following the completion of the 100th day of service and such employee shall be immediately subject to the organizational security provisions in this agreement.

This proposal, like the proposal regarding short-term employees, is outside the scope of representation because it seeks to negotiate for employees outside the classified unit.

Education Code section 45103 provides, in relevant part:

> Substitute and short-term employees, employed and paid for less than 75 percent of a school year, shall not be part of the classified service.
>
> . . . . . .
>
> "Seventy-five percent of a school year" means 195 working days . . . .

Proposal 17.3 seeks to define substitute employees working more than 100 days as regular employees and subject to organizational security provisions. However, the unit CSEA represents is limited to the classified service. The employees described by the Education Code are not a part of the classified service and are therefore not within the bargaining unit. Thus, this proposal is nonnegotiable because CSEA cannot bargain on behalf of employees it does not represent.

17.4 Student Employees; The District shall not employ any students under any secondary school or college work-study program, or in any state- or federally-funded work experience program in any position that would directly or indirectly affect the rights of CSEA or of any employee in the bargaining unit.

This proposal is not, as the District contends, an attempt to negotiate on behalf of student employees but seeks only to preserve the work of existing bargaining unit members. It

thereby relates to wages, hours, and enumerated terms and conditions of employment. On numerous occasions, the Board, applying the Anaheim test, has held that the transfer of work out of the bargaining unit is negotiable as a matter relating to wages and hours (See, e.g., Rialto Unified School District (4/30/82) PERB Decision No. 209; Solano County Community College District (6/30/82) PERB Decision No. 219; Arcohe Union Elementary School District (11/23/83) PERB Decision No. 360; Mt. San Antonio Community College District, PERB Decision No. 334, supra). Consistent with established Board precedent, we find proposal 17.4 negotiable.

17.5 Distribution of Job Information; Upon initial employment and each change in classification each affected employee in the bargaining unit shall receive a copy of the applicable job description, a specification of the monthly and hourly rates applicable to his or her position, a statement of the duties of the position, a statement of the employee's regular work site, regularly assigned work shift, the hours per day, days per week, and months per year.

Access to the type of information referred to in the Association's proposal relates to wages, hours, and the processing of employee grievances. Moreover, the settlement of disputes with regard to access to this information is best left to the parties to resolve. Finally, we can conceive of no managerial prerogative with which employee access to this sort of information would conflict. Indeed, in its brief before the Board, the District does not contest the negotiability of this proposal. Accordingly, we find proposal 17.5 negotiable.

Article XIX. Promotion

19.1 First Consideration; Employees in the bargaining unit shall be given first consideration in filling any job vacancy which can be considered a promotion after the announcement of the position vacancy.

19.2 Posting of Notice;

19.2.1 Notice of all job vacancies shall be posted on bulletin boards in prominent locations at each District job site.

19.2.2 The job vacancy notice shall remain posted for a period of six (6) full working days, during which time employees may file for the vacancy. Any employee who will be on leave or layoff during the period of the posting shall be mailed a copy of the notice by First Class Mail on the date the position is posted.

19.3 Notice Contents; The job vacancy notice shall include; The job title, a brief description of the position and duties, the minimum qualifications required for the position, the assigned job site, the number of hours per day, regular assigned work shift times, days per week, and months per year assigned to the position, the salary range, and the deadline for filing to fill the vacancy.

19.4 Filing; Any employee in the bargaining unit may file for the vacancy by submitting written notice to the personnel department within the filing period. Any employee on leave or vacation may authorize his/her Job Representative to file on the employee's behalf.

19.5 Certification of Applicants; Within five (5) days following completion of the filing period, the personnel office shall certify in writing the qualifications of applicants and notify each applicant of his/her standing.

19.6 Promotional Order; Any employee in the bargaining unit who files for the vacancy during the posting period and meets the minimum qualifications shall be promoted into the vacant position. If two (2) or more employees who file meet the minimum qualifications, the employee with the greatest bargaining unit seniority shall be the one promoted. In the event that two (2) or more employees have identical seniority, the employee to fill the position shall be selected by lot.

Article XIX establishes the substantive and procedural rights of bargaining unit members in the event that promotional opportunities arise. The substantive and procedural rights of employees to obtain promotions are related to virtually every subject of bargaining enumerated in section 3543.2. Promotional opportunities are, of course, of extreme importance to both employees and management, and the issues arising therefrom are appropriately resolved through the collective bargaining process. We also find that this proposal does not interfere with any managerial prerogative.

However, to the extent that proposal 19.1 would require the employer to grant preference to unit members in filling jobs outside of the unit, we find it overbroad. CSEA, as the representative of a unit of classified employees, is precluded from negotiating a preference for unit members as to vacancies which occur outside of the unit which it represents.

Article XX. Classification, Reclassification, and Abolition of Positions

In Alum Rock Union Elementary School District (6/27/83) PERB Decision No. 322, the Board found that an employer's unilateral adoption and implementation of a new classification plan involved numerous changes of matters within the scope of representation. Applying the Anaheim test, the Board found the following subjects within scope;

> (1) the transfer of work from one classification to another; (2) the retitling

> of classifications; (3) all matters related to salaries, including the salary ranges to which newly created classifications are assigned and any changes in salaries or salary ranges of existing classifications; (4) the reassignment of employees from existing classifications to different or newly created classifications; (5) the allocation of positions to classifications; (6) the grouping of classifications into occupational groups; and (7) the effects, if any, on terms and conditions of employment of those classification decisions within the District's exclusive prerogative, including the creation of new classifications to perform functions not previously performed, the abolition of classifications to cease engaging in functions previously performed, and the revision of job specifications.

Our decision in Alum Rock is, to a large extent, dispositive of the proposals raised in Article XX.

20.1 Placement in Class; Every bargaining unit position shall be placed in a class.

In Alum Rock, supra, we noted that Education Code section 45103 requires public school districts to classify all employees and positions with certain designated exceptions, and that Education Code subsection 45101(a) provides the following definition of "classification" or "class":

> "Classification" means that each position in the classified service shall have a designated title, a regular minimum of assigned hours per day, days per week, and months per year, a specific statement of the duties required to be performed by the employees in each such position; and the regular monthly salary ranges for each such position.

Thus, by definition, the classification of a position is related to the wages and hours of an employee occupying that position. In addition, the classification of a position is

also logically related to transfer and evaluation policies. CSEA's attempt to require that each position be classified invades no managerial prerogative since it merely reiterates the District's existing obligation under Education Code section 45103. We, therefore, find this proposal to be negotiable.

20.2 Classification and Reclassification Requirement: Position classification and reclassification shall be subject to mutual written agreement between the District and CSEA, and any dispute shall be subject to the grievance procedure. Either party may propose a reclassification at any time during the life of this agreement for any position.

In Alum Rock, supra, at p. 11, the Board determined that the decision "to create a new classification to perform a function not previously performed or to abolish a classification and cease engaging in the activity previously performed by employees in that classification" is a managerial prerogative. Thus, to the extent that proposal 20.2 seeks to require bilateral agreement about such clear managerial decisions, it is beyond the scope of bargaining.

However, management remains obligated to negotiate both the effects on matters within scope of those classification decisions within its exclusive prerogative and "those aspects of the creation or abolition of a classification which merely transfer existing functions and duties from one classification to another." Alum Rock, supra.

In addition, the reassignment of incumbent employees from existing classifications to different or newly created

classifications is negotiable. Alum Rock, supra, p. 18. Inasmuch as "reclassification" is defined in Education Code subsection 45101(f) as "the upgrading of a position to a higher classification as a result of the gradual increase of the duties being performed by the incumbent in such position," it is clearly a form of reassignment and is negotiable.

To the extent that proposal 20.2 would subject these negotiable matters to written agreement and to the grievance procedure, it is negotiable. In any event, as discussed, supra, where a proposal contains both negotiable and nonnegotiable elements, the District is obligated to meet for the purpose of clarifying and attempting to narrow the proposal to its in-scope elements.

20.3 New Positions or Classes of Positions; All newly created positions or classes of positions, unless specifically exempted by law, shall be assigned to the bargaining unit if the job descriptions describe duties performed by employees in the bargaining unit or which by the nature of the duties should reasonably be assigned to the bargaining unit.

Proposal 20.3 seeks to ensure that all newly created positions or classes of positions shall be assigned to the bargaining unit which CSEA currently represents if they describe, or reasonably relate to duties performed by employees in the bargaining unit. The proposal, thus, seeks to establish a procedure for unit modification.

At the time at which this case arose, PERB regulations established specific criteria and procedures for effecting unit

modification. CSEA urges that, because these regulations have now been amended to permit Board approval of unit modifications mutually agreed to by the parties (PERB regulation 32781, effective February 14, 1983), proposal 20.3 is thereby rendered negotiable.

Preliminarily, inasmuch as nothing in regulation 32781 indicates that it is to have retroactive effect, our decision in this case must be governed by the statute and regulations in effect at the time this controversy arose. Simi Educators Association (5/27/83) PERB Decision No. 315; California Code of Civil Procedure, section 3. Moreover, at all times from the date of filing of this charge to the present, the Board itself has been entrusted by the Legislature with exclusive authority to approve appropriate units (subsection 3541.3(a)).

Contrary to CSEA's contentions, even assuming that regulation 32781 was applicable to this case, the permissive language of this section neither creates an obligation to negotiate unit modification procedures, nor cedes to the parties PERB's statutory authority in this area. Because CSEA cannot negotiate a proposal which would circumvent the dictates of EERA or PERB, proposal 20.3 is nonnegotiable. See, generally, Allied Chemical Workers v. Pittsburgh Plate Glass Co. (1972) 404 U.S. 157 [78 LRRM 2974] and Douds v. Longshoremen (2d Cir. 1957) 241 F.2d 278 [39 LRRM 2388] (holding that unit modification is not a mandatory subject of bargaining under the National Labor Relations Act).

20.4 Salary Placement of Reclassified Positions: When a position or class of positions is reclassified, the position or positions shall be placed on the salary schedule in a range which will result in at least one (1) range increase above the salary of the existing position or positions, but in no event will the reclassification result in an increase of less than five and one-half (5-1/2) percent.

This proposal constitutes a wage demand. The District does not dispute that it is negotiable, and we so hold. Sonoma County Board of Education v. PERB (1980) 102 Cal.App.3d 689 [63 Cal.Rptr. 464]; Alum Rock, supra.

20.5 Incumbent Rights; When an entire class of positions is reclassified, the incumbents in the positions shall be entitled to serve in the new positions. When a position or positions less than the total class is or are reclassified, incumbents in the positions who have been in the positions for one (1) year or more shall be reallocated to the higher class. If an incumbent in such a position has not served in that position for one (1) year or more, then the new position shall be considered a vacant position subject to the lateral transfer and promotion provisions of this agreement.

This proposal seeks to establish the rights of incumbent employees to be assigned to reclassified positions. It directly relates to wages, transfer and reassignment policies and, as we indicated in Alum Rock, such changes which merely transfer existing functions and duties from one classification to another involve no overriding managerial prerogative.

This proposal falls squarely within the holding of Alum Rock that the employer has a duty to negotiate the reassignment of incumbent employees from existing classifications to different or newly created classifications and is negotiable.

20.6 Downward Adjustment; Any downward adjustment of any position or class of positions shall be considered a demotion and shall take place only as a result of following the layoff or disciplinary procedures of this agreement.

This proposal defines downward adjustments as demotions and subjects them to the same negotiated procedures used in layoffs or disciplinary actions. The proposal clearly relates to wages and reassignment procedures, both enumerated subjects within scope. In large part, the proposal simply incorporates into the negotiated agreement definitions set forth in section 45101 of the Education Code. Thus, where a downward adjustment occurs without the employee's voluntary consent, it is defined by Education Code subsections 45101(d) and (e) as a "demotion" and as "disciplinary action," respectively. Where such downward adjustment is voluntarily consented to by the employee, in order to avoid interruption of employment by layoff, it is defined by subsection 45101(g) as a "layoff for lack of funds or layoff for lack of work."[18]

To the extent the proposal is consistent with these Education Code requirements, it impinges on no managerial prerogatives and is negotiable. Thus, the District had a duty to meet with CSEA to clarify and refine the proposal to its negotiable elements.

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[18]See discussion of this section of the Education Code, infra, at p. 56 et seq.

20.7 Abolition of a Position or Class of Positions; If the District proposes to abolish a position or class of positions, it shall notify CSEA in writing and the parties shall meet and negotiate. No position or class of positions shall be abolished unless agreement has been reached with CSEA.

As indicated above, we found in Alum Rock, supra, that the decision "to abolish a classification and cease engaging in the activity previously performed by employees in that classification" is a managerial prerogative. However, in this proposal, the Association asks that it be provided with notice of the decision to abolish a position or class of positions. As with any nonnegotiable unilateral decision, the employer remains obligated to provide notice and an opportunity to negotiate as to the effects of that decision.

By its terms, the remainder of CSEA's proposal would unlawfully restrict the District's exercise of its managerial prerogative by requiring prior agreement with CSEA. That portion of the proposal is, therefore, nonnegotiable.

CSEA belatedly concedes that the proposal is nonnegotiable, but requests an opportunity to refine the proposal and limit it to a request to negotiate the impact of the decision to abolish a classification. While such proposal limited to the effects on negotiable subjects would unquestionably be a proper subject of bargaining, we cannot read the clear and unambiguous language of proposal 20.7 to contain such a request. Except as to that portion of the proposal which requires that CSEA be notified of the District's intentions, we find the proposal nonnegotiable.

Article XXI. Layoff and Reemployment

21.1 Reason for Layoff; Layoff shall occur only for lack of work or lack of funds. Lack of funds means that the district cannot sustain a positive financial dollar balance with the payment of one further month's anticipated payroll.

In Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223, the Board held that the decision to lay off classified employees is a managerial prerogative. See also Kern Community College District (8/19/83) PERB Decision No. 337; Newark Unified School District (6/30/82) PERB Decision No. 225. However, management is obligated to negotiate the effects of its layoff decision on matters within the scope of representation. Newark Unified School District, supra; Kern Community College District, supra; Oakland Unified School District (11/2/81) PERB Decision No. 178; Solano County Community College District (6/30/82) PERB Decision No. 219; Oakland Unified School District, PERB Decision No. 326, supra.

Proposal 21.1 provides that employees may be laid off only for lack of funds or lack of work. In addition, it attempts to establish a definition of "lack of funds." We find that this proposal is partially negotiable and partially nonnegotiable.

Education Code section 45308 provides, in relevant part, "[c]lassified employees shall be subject to layoff for lack of work or lack of funds." In our view, this provision of the Education Code establishes an inflexible standard which precludes the parties from negotiating a definition of the

statutory terms "lack of work" and "lack of funds." To the extent the proposal attempts to establish such a definition through the negotiating process, it is nonnegotiable.

However, there is no reason why the parties may not restate the provisions of the Education Code which are otherwise related to matters within the scope of representation. San Mateo City School District et al. v. PERB, supra. Accordingly, we find that portion of CSEA's proposal which seeks to provide that an employee may be laid off only for the reasons set forth in Education Code section 45308 is negotiable.

21.2 Notice of Layoff: Any layoffs under Section 21.1 shall only take place effective as of the end of an academic year. The District shall notify both CSEA and the affected employees in writing no later than April 15th of any planned layoffs. The District and CSEA shall meet no later than May 1st following the receipt of any notices of layoff to review the proposed layoffs and determine the order of layoff within the provisions of this agreement. Any notice of layoffs shall specify the reason for layoff and identify by name and classification the employees designated for layoff. Failure to give written notice under the provisions of this section shall invalidate the lay off.

On its face, proposal 21.2 seeks to negotiate the notice and timing of layoff. However, when this proposal is carefully examined, we find it to unlawfully intrude on the employer's ability to layoff employees.

In Oakland Unified School District, PERB Decision No. 178, supra, and Oakland Unified School District, PERB Decision No. 326, supra, the Board examined layoff notice proposals in

light of Education Code section 45117.19 That code provision establishes that, as a minimum, classified employees subject to

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[19]Education Code section 45117 provides:

> (a) When, as a result of the expiration of a specially funded program, classified positions must be eliminated at the end of any school year, and classified employees will be subject to layoff for lack of funds, the employees to be laid off at the end of the school year shall be given written notice on or before May 29 informing them of their layoff effective at the end of the school year and of their displacement rights, if any, and reemployment rights. However, if the termination date of any specially funded program is other than June 30, the notice shall be given not less than 30 days prior to the effective date of their layoff.
>
> (b) When, as a result of a bona fide reduction or elimination of the service being performed by any department, classified employees shall be subject to layoff for lack of work, affected employees shall be given notice of layoff not less
>
> than 30 days prior to the effective date of layoff, and informed of their displacement rights, if any, and reemployment rights.
>
> (c) Nothing herein provided shall preclude a layoff for lack of funds in the event of an actual and existing financial inability to pay salaries of classified employees, nor layoff for lack of work resulting from causes not foreseeable or preventable by the governing board, without the notice required by subdivision (a) or (b).
>
> This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240).

layoff must be so advised not less than 30 days prior to the effective date of the layoff. In accordance with this statutory language, the Board has found that the employee organization may negotiate a notice period greater than 30 days. However, the Board has also concluded that proposals seeking to impose a deadline for layoffs are outside the scope of representation because such proposals intrude on management's right to effect layoffs for lack of work or funds.

In this case, by seeking to restrict layoffs to the end of the academic year, the Association's proposal similarly impinges on management's express statutory authority. The April 15 notice deadline is tied to the impermissible end of the year layoff restriction and has the same effect as imposing a deadline. For this reason, the proposal cannot be read merely to add to the 30 day notice period provided by the Code. We conclude, therefore, that, while the Association may negotiate the order of layoff and the content of the notices provided, this proposal goes beyond that which may be negotiated in accord with the Education Code.

21.3 Reduction in Hours; Any reduction in regularly assigned time shall be considered a layoff under the provisions of this Article.

Proposal 21.3 provides that any reduction in hours will be considered a layoff under the terms of the parties' agreement.

In North Sacramento School District (12/31/81) PERB Decision No. 193, the Board held that a reduction in hours may

be distinguished from a layoff and that, in the absence of a superseding provision of the Education Code, a reduction in hours is negotiable. See also Pittsburg Unified School District (6/10/83) PERB Decision No. 318, Azusa Unified School District (12/30/83) PERB Decision No. 374. Since the North Sacramento School District was a "merit" school district within the meaning of the Education Code (see Education Code section 45240 et seq.), the Board found that it was unnecessary in that case to reach the question of whether Education Code subsection 45101(g),[20] which applies to non-merit school districts, affects the negotiability of reductions in hours.

The Healdsburg Districts in this case are both non-merit districts and assert that Education Code subsection 45101(g) preempts the right of employees to negotiate a reduction in hours. We find that it does not.

Education Code subsection 45101(g) grants employees, who voluntarily consent to a reduction in hours or reassignment in lieu of layoff, the same procedural rights that they would be afforded by the Education Code were they subject to a layoff

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[20]Education Code subsection 45101(g) provides:

> "Layoff for lack of funds or layoff for lack of work" includes any reduction in hours of employment or assignment to a class or grade lower than that in which the employee has permanence, voluntarily consented to by the employee, in order to avoid interruption of employment by layoff.

itself. We find that, because Education Code subsection 45101(g) is not cast in mandatory terms but makes reduction in hours or reassignment in lieu of layoff voluntary, there is nothing in that section which is inconsistent with the employer's duty to negotiate those issues with the exclusive representative. Under the doctrine of exclusivity, which lies at the very heart of the collective bargaining process, employees who choose to be represented in matters of employment relations by an exclusive representative cede to that entity the right to represent them on all matters within the scope of representation. See Emporium Capwell Co. v. Western Addition Community Org., supra, and cases cited therein. Thus, an employer who wishes to offer employees the opportunity to be reassigned or to have their hours reduced in lieu of layoff, must seek consent from the exclusive representative through the negotiation process.

Accordingly, we find that a reduction in hours is negotiable, and that Education Code subsection 45101(g) does not conflict with an employer's duty to negotiate that issue with the exclusive representative. Since the Association's proposal grants employees subject to a reduction in hours the same contractual rights to which they are entitled in the event of layoff, it is, in our view, negotiable to the extent the Association's layoff proposals are negotiable.

21.4 Order of Layoff; Any layoff shall be effected within a class. The order of layoff shall be based on seniority within that class and higher classes throughout the District. An employee with the least seniority within the class plus higher classes shall be laid off first. Seniority shall be based on the number of hours an employee has been in a paid status in the class plus higher classes or seniority acquired under Section 21.7.

There is no question that the order in which employees are laid off is, absent supersession considerations, negotiable under the Anaheim test. Layoff of employees terminates the employment relationship and, therefore, has a direct impact on virtually every subject of bargaining enumerated in section 3543.2. It is self-evident that the termination of an employment relationship through a layoff can, and very often does, cause extreme conflict between employees and management. Negotiations provide a forum in which management and labor can mutually consider means of ameliorating conflict between the parties.

We also find no support for the District's contention that the Association's right to negotiate the order of layoffs is superseded by Education Code section 45308.21 Because

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2lEducation Code section 45308 provides, in relevant part:

> Whenever a classified employee is laid off, the order of layoff within the class shall be determined by length of service. The employee who has been employed for the shortest time in the class, plus higher classes, shall be laid off first. Reemployment shall be in the reverse order of layoff.

proposal 21.4 closely parallels Education Code section 45308, there is nothing in the proposal which is inconsistent with the seniority and reemployment rights established by the section and we, therefore, find it negotiable.

21.5 Bumping Rights; An employee laid off from his or her present class may bump into the next lowest class in which the employee has greatest seniority considering his/her seniority in the lower class and any higher classes. The employee may continue to bump into lower classes to avoid layoff.

21.6 Layoff in Lieu of Bumping; An employee who elects a layoff in lieu of bumping maintains his/her reemployment rights under this agreement.

Proposals 21.5 and 21.6 establish bumping rights in the event of layoff. The right of an employee to retain employment and to bump other employees is directly related to the wages and hours of employees. Since, as noted above, issues surrounding layoffs are of extreme importance to both management and labor, they are appropriately resolved through the collective bargaining process. Finally, we find nothing in this proposal which would impermissibly interfere with a managerial prerogative. Therefore, we find that the Association's bumping rights proposals are negotiable.

21.7 Equal Seniority; If two (2) or more employees subject to layoff have equal class seniority, the determination as to who shall be laid off will be made on the basis of the greater bargaining unit seniority or, if that be equal, the greater hire date seniority, and if that be equal, the greater hire date seniority, and if that be equal, then the determination shall be made by lot.

Proposal 21.7 attempts to establish the order of layoffs of employees with equal class seniority. For the same reasons

stated above with respect to proposal 21.4, this proposal bears an obvious relationship to wages, hours, and other terms and conditions of employment and, absent supersession considerations, is negotiable.

Education Code section 45308, supra, which establishes that classified employees must be laid off in order of class seniority, is silent as to the method of determining the order of layoff of employees with equal class seniority. The Association's proposal seeks to establish such a method. Since the proposal does not conflict with any provision of the Education Code, we conclude that it is negotiable.[22]

21.8 Reemployment Rights: Laid off persons are eligible for reemployment in the class from which laid off for a thirty-nine (39) month period and shall be reemployed in the reverse order of layoff.

Their employment shall take precedence over any other type of employment, defined or undefined in this agreement.

In addition, they shall have the right to apply for promotional positions within the filing period specified in the Promotion Article of this agreement and use their bargaining unit seniority therein for a period of thirty-nine (39) months following layoff. An employee on a reemployment list shall be notified of promotional opportunities in accordance with the provisions of 19.2.1.

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[22]We note that in Mt. Diablo Unified School District (12/30/83) PERB Decision No. 373, the majority of the Board found that Education Code section 44955, which applies to certificated employees, superseded the right of employees to negotiate the order of layoff of employees with the same date of hire. Our decision in the present case is applicable to classified employees only.

21.14 Reemployment in Highest Class; Employees shall be reemployed in the highest rated job classification available in accordance with their class seniority. Employees who accept a position lower than their highest former class shall retain their original thirty-nine (39) month rights to the higher paid position.

21.16 Seniority During Involuntary Unpaid Status; Upon return to work, all time during which an individual is in involuntary unpaid status shall be counted for seniority purposes not to exceed thirty-nine (39) months, except that during such time the individual will not accrue vacation, sick leave, holidays or other leave benefits.

Proposals 21.8, 21.14, and 21.16 establish reemployment rights of employees in the event of layoff. The right to reemployment is related to virtually every subject of bargaining set forth in section 3543.2 and is negotiable. These proposals reiterate rights established by Education Code section 4529823 and are, therefore, negotiable.

23Education Code section 45298 provides:

> Persons laid off because of lack of work or lack of funds are eligible to reemployment for a period of 39 months and shall be reemployed in preference to new applicants. In addition, such persons laid off have the right to participate in promotional examinations within the district during the period of 39 months.
>
> Employees who take voluntary demotions or voluntary reductions in assigned time in lieu of layoff or to remain in their present positions rather than be reclassified or reassigned, shall be granted the same rights as persons laid off and shall retain eligibility to be considered for reemployment for an additional period of up to 24 months; provided, that the same tests of fitness under which they qualified for

21.9 Voluntary Demotion or Voluntary Reduction in Hours; Employees who take voluntary demotions or voluntary reductions in assigned time in lieu of layoff shall be, at the employee's option, returned to a position in their former class or to positions with increased assigned time as vacancies become available, and with no time limit, except that they shall be ranked in accordance with their seniority on any valid reemployment list.

Proposal 21.9 provides that employees who choose voluntary demotion in lieu of layoff shall be reassigned to positions as they become available based on existing reemployment or seniority lists.

As noted above, Education Code subsection 45101(g) defines "layoff" as including a voluntary demotion or reassignment in lieu of layoff. We have found that, under the doctrine of exclusivity, an exclusive representative may negotiate on behalf of individual employees with respect to their rights under subsection 45101(g). Since this proposal concerns

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> appointment to the class shall still apply. The personnel commission shall make the determination of the specific period eligibility for reemployment on a class-by-class basis.
>
> Employees who take voluntary demotions or voluntary reductions in assigned time in lieu of layoff shall be, at the option of the employee, returned to a position in their former class or to positions with increased assigned time as vacancies become available, and without limitation of time, but if there is a valid reemployment list they shall be ranked on that list in accordance with their proper seniority.

reassignments and increases in hours effectuated in accordance with the provisions of Education Code subsection 45101(g), it is negotiable.

21.10 Retirement in Lieu of Layoff;

21.10.1 Any employee in the bargaining unit may elect to accept a service retirement in lieu of layoff, voluntary demotion, or reduction in assigned time. Such employee shall within ten (10) workdays prior to the effective date of the proposed layoff complete and submit a form provided by the District for this purpose.

21.10.2 The employee shall then be placed on a thirty-nine (39) month reemployment list in accordance with Section 21.8 of this Article; however, the employee shall not be eligible for reemployment during such other period of time as may be specified by pertinent Government Code sections.

21.10.3 The District agrees that when an offer of reemployment is made to an eligible person retired under this Article, and the District receives within ten (10) working days a written acceptance of the offer, the position shall not be filled by any other person, and the retired person shall be allowed sufficient time to terminate his/her retired status.

21.10.4 An employee subject to this Section who retires and is eligible for reemployment and who declines an offer of reemployment equal to that from which laid off shall be deemed to be permanently retired.

21.10.5 Any election to retire after being placed on a reemployment list shall be retirement in lieu of layoff within the meaning of this section.

Proposal 21.10 is an attempt to permit individual employees targeted for layoff to elect retirement as an alternative to layoff. Retirement is inextricably related to employees' wages and hours. We find that the layoff alternative sought in proposal 21.10 is a matter of critical concern to employees and employers alike and is well suited to resolution through he bilateral process.

We also find that this proposal poses no obstacle to the employer's ability to exercise its managerial prerogatives. In our view, proposals seeking alternatives to layoffs raised during the course of regular contract negotiations do not interfere with the as yet undecided layoff. Rather, proposals presented at this juncture merely suggest options available to particular employees should a future layoff decision be made.

This conclusion does not disturb the Board's prior rulings, noted supra, which reserve the layoff decision to management and which preclude the employee organization from presenting proposals that seek alternatives to that decision after the layoff decision has been made. In those situations, proposing alternatives, by definition, encroaches on the layoff decision itself. Here, however, CSEA's layoff alternative proposal was not raised after or in response to a decision to lay off during the contract term. It is, therefore, negotiable.

21.11 Seniority Roster; The District shall maintain an updated seniority roster indicating employees' class seniority, bargaining unit seniority, and hire date seniority. In addition to the requirements of Section 5.1.5 such rosters shall be available to CSEA at any time upon demand.

Proposal 21.11 requires the District to maintain a seniority roster which is available to the Association upon demand. This proposal is plainly related to wages and hours and, like the access to information proposals considered above, is also related to the Association's ability to administer the contract through the grievance procedure. We are aware of no

managerial prerogatives with which it would conflict. Accordingly, we find Proposal 21.11 negotiable.

21.12 Notification of Reemployment Opening; Any employee who is laid off and is subsequently eligible for reemployment shall be notified in writing by the District of an opening. Such notice shall be sent by certified mail to the last address given the District by the employee, and a copy shall be sent to CSEA by the District, which shall acquit the District of its notification responsibility.

Proposal 21.12 requires the District to notify laid-off employees and CSEA of reemployment opportunities. We find that this proposal is clearly related to wages and hours and does not conflict with any managerial prerogatives. It is, therefore, negotiable.

21.13 Employee Notification to District; An employee shall notify the District of his or her intent to accept or refuse reemployment within ten (10) working days following receipt of the reemployment notice. If the employee accepts reemployment, the employee must report to work within thirty (30) working days following receipt of the reemployment notice. An employee given notice of reemployment need not accept the reemployment to maintain the employee's eligibility on the reemployment list, provided the employee notifies the District of refusal of reemployment within ten (10) working days from receipt of the reemployment notice.

Proposal 21.13 requires laid-off employees to notify the District of their intent to accept or reject reemployment within certain time periods. Again, we find that this proposal relates directly to the wages and hours of employees and does not interfere with any managerial prerogatives and is, therefore, negotiable.

21.15 Improper Layoff; Any employee who is improperly laid off shall be reemployed immediately upon discovery of the error and shall be reimbursed for all loss of salary and benefits.

Proposal 21.15 provides that an employee who is improperly laid off shall be reemployed immediately and reimbursed for lost wages and benefits. This proposal directly concerns wages and is, therefore, within the scope of representation.

In so concluding, we distinguish our findings in Jefferson School District (6/19/80) PERB Decision No. 133, rev. den. 1 Civ. 50241, and in Mt. Diablo Unified School District, supra, where, in each case, the union's proposals sought to secure a fixed amount of compensation for withdrawn layoff notices. Unlike those proposals which we viewed as unlawful penalties, the instant proposal is directly tied to an employee's lost salary and benefits.

Article XXII. Disciplinary Action

22.1 Exclusive Procedure; Discipline shall be imposed upon bargaining unit employees only pursuant to this Article.

22.2 Disciplinary Procedure;

22.2.1 Discipline shall be imposed on permanent employees of the bargaining unit only for just cause. Disciplinary action is deemed to be any action which deprives any employee in the bargaining unit of any classification or incident of employment or classification in which the employee has permanence and includes but is not limited to dismissal, demotion, suspension, reduction in hours or class or transfer or reassignment without the employee's voluntary written consent.

22.2.2 Except in those situations where an immediate suspension is justified under the provisions of this Agreement, an employee whose work or conduct is of such character as to incur discipline shall first be specifically warned in writing by the Supervisor. Such warning shall state the reasons underlying any intention the Supervisor may have of recommending any disciplinary action and a copy of the warning shall be sent to the Job Representative. The Supervisor shall give a reasonable period of advanced warning to permit the

employee to correct the deficiency without incurring disciplinary action. An employee who has received such a warning may appeal the warning notice through the grievance procedure, and in addition, shall have the option of requesting a lateral transfer under the provisions of this agreement.

22.2.3 Discipline less than discharge will be undertaken for corrective purposes only.

22.2.4 The District shall not initiate any disciplinary action for any cause alleged to have arisen prior to the employee becoming permanent nor for any cause alleged to have arisen more than one year preceding the date that the District files the notice of disciplinary action.

22.2.5 When the District seeks the imposition of any disciplinary punishment, notice of such discipline shall be made in writing and served in person or by registered or certified mail upon the employee. The notice shall indicate (1) the specific charges against the employee which shall include times, dates, and location of chargeable actions or omissions, (2) the penalty proposed, and (3) a statement of the employee's right to make use of the grievance procedure to dispute the charges or the proposed penalty. A copy of any notice of discipline shall be delivered to the Job Representative within twenty-four (24) hours after service on the employee.

22.2.6 The penalty proposed shall not be implemented until the employee has exhausted his/her rights under the grievance article.

22.2.7 An employee may be relieved of duties without loss of pay at the option of the District.

22.3 Emergency Suspension;

22.3.1 CSEA and the District recognize that emergency situations can occur involving the health and welfare of students or employees. If the employee's presence would lead to a clear and present danger to the lives, safety, or health of students or fellow employees the District may immediately suspend with pay the employee for three (3) days. No suspension without pay shall take effect until three (3) working days after service of a notice of suspension.

22.3.2 During the three (3) days, the District shall serve notice and the statement of facts upon the employee, who shall be entitled to respond to the factual contentions supporting the emergency at Step 4 of the grievance procedure.

22.4 Disciplinary Grievance;

22.4.1 Any proposed discipline and any emergency suspension shall be subject to the grievance procedure of this Agreement and the employee, at his/her option, may commence review either at Step l, 2, or 3.

22.4.2 An employee upon whom notice of discipline has been served, may grieve any emergency suspension without pay at Step 3 of the grievance procedure. The grievance meeting shall be held and a response made within three (3) days of the submission of the grievance. Notwithstanding any separate grievance meeting held in accordance with the preceding sentence, the employee may also grieve the emergency suspension along with the notice of discipline.

22.5 Disciplinary Settlements; A disciplinary grievance may be settled at any time following the service of notice of discipline. The terms of the settlement shall be reduced to writing. An employee offered such a settlement shall be granted a reasonable opportunity to have his/her Job Representative review the proposed settlement before approving the settlement in writing.

Discipline in General

In San Bernardino Unified School District (10/29/82) PERB Decision No. 255, the Board in applying the Anaheim test found that both the procedures and the criteria for imposing discipline were negotiable. This determination was reaffirmed by the Board in Arvin Union School District (3/30/83) PERB Decision No. 300.

Article XXII establishes a disciplinary procedure and a requirement that there be "good cause" for the imposition of discipline. We find nothing in these proposals which would, as a general proposition, significantly abridge the District's

managerial prerogatives.[24] We, therefore, find them negotiable.

Arbitration of Disciplinary Matters

Article XXIII outlines a four step grievance procedure culminating in "final and binding arbitration."25 Articles XXII and XXIII, read together, require binding arbitration of all disciplinary disputes arising from the agreement. Because we have determined above that the central aspects of CSEA's proposed "Disciplinary Action" proposal are negotiable, it is necessary to resolve the specific question of whether arbitration of disciplinary disputes is negotiable.

The District does not argue that common law principles, per se, bar school boards from entering into agreements whereby intended disciplinary actions would be subject to final and binding review, pursuant to contractual grievance procedures, by a neutral arbitrator.[26] Rather, the District's only

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[24]We disagree with the conclusion reached in Chairperson Gluck's dissenting opinion finding that portion of proposal 22.2.2 permitting employees to request a transfer when disciplinary action is contemplated to be nonnegotiable. In our view, since transfers are expressly enumerated in section 3543.2, that portion of the Association's proposal is negotiable.

[25]This proposal is not in dispute except insofar as it applies to binding arbitration of disciplinary matters.

[26]In any event, any such argument must be rejected.

> Just as the doctrine of sovereign immunity has been abandoned in many fields of law, so the principle of nondelegability of decision-making by public management in the

argument against the negotiability of disciplinary arbitration arises from its interpretation of Education Code section 45113. Education Code section 45113 provides:

> The governing board of a school district shall prescribe written rules and regulations, governing the personnel management of the classified service, which shall be printed and made available to employees in the classified service, the public, and those concerned with the administration of this section, whereby such employees are designated as permanent employees of the district after serving a prescribed period of probation which shall not exceed one year.
>
> Any employee designated as a permanent employee shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, but the governing board's determination of the

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> case of employee relations has yielded to the sounder and more reasonable proposition that the authority and duty to bargain collectively includes the power voluntarily to agree to third-party arbitration in accordance with standards mutually acceptable to the bargaining parties. Moreover, it is generally conceded that civil service regulations, even when conscientiously applied, are not an adequate substitute for a grievance and arbitration procedure hand tailored by the parties to meet their particular needs. (Cal. Assem. Advisory Council, Final Rep. (March 15, 1973) ["Aaron Commission Report"], pp. 177-178, discussed infra.)

Also see, e.g., Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608; Taylor v. Crane (1979) 24 Cal.3d 442 [155 Cal.Rptr. 695]; Kugler v. Yocum (1968) 69 Cal.2d 371, 381-382; Education Code section 35160; 60 Ops.Atty.Gen. 177, 178-180 (1977); 60 Ops.Atty.Gen. 206 (1977); 63 Ops.Atty.Gen. 851 (1980).

sufficiency of cause for disciplinary action shall be conclusive.[27]

> The governing board shall adopt rules of procedure for disciplinary proceedings which shall contain a provision for informing the employee by written notice of the specific charges against him, a statement of his right to a hearing on such charges, and the time within which such hearing may be requested which shall be not less than five days after service of the notice to the employee, and a card or paper, the signing and filing of which shall constitute a demand for hearing, and a denial of the charges. The burden of proof shall remain with the governing board, and any rule or regulation to the contrary shall be void.
>
> No disciplinary action shall be taken for any cause which arose prior to the employee's becoming permanent, nor for any cause which arose more than two years preceding the date of the filing of the notice of cause unless such cause was concealed or not disclosed by such employee when it could reasonably be assumed that the employee should have disclosed the facts to the employing district.
>
> This section shall apply only to districts not incorporating the merit system as outlined in Article 6 (commencing with Section 45240) of this chapter. (Emphasis added.)

The District argues that, under this statute, school employers have "conclusive authority" to determine the

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[27]"Cause" relating to discipline

> . . . means those grounds for discipline, or offenses, enumerated in the law or the written rules of a public school employer. No disciplinary action may be maintained for any "cause" other than as defined herein. (Education Code subsection 45101(h).)

sufficiency of cause for discipline. In the District's view, the statutory term "conclusive" means "non-delegable." Thus, the District argues, a proposal calling for arbitration of disciplinary disputes would conflict with Education Code section 45113 and is nonnegotiable under supersession principles.

In our view, the District's interpretation fails to "harmonize" Education Code section 45113 with the EERA. San Mateo City School District et al. v. PERB, supra. As will be shown below, we find that the Legislature intended EERA to permit negotiation of binding arbitration procedures with respect to all negotiable matters, and that the Legislature could, and would, have expressly limited arbitration under section 3548.5 to nondisciplinary matters had it so intended. Our evaluation of the development of disciplinary arbitration and collective bargaining, the legal limitations of school districts' general authority during the period in question, and judicial interpretation of similar language in a parallel Education Code section show that section 45113 was not intended by the Legislature to address—much less prohibit—delegation of governing board disciplinary authority. Hence, inasmuch as disciplinary procedures are within the scope of representation under the Board's Anaheim test (San Bernardino Unified School District, supra; Arvin Union School District, supra), a

proposal calling for arbitration of disputes arising from such procedures is negotiable.

The EERA itself explicitly permits binding arbitration of contractual grievances. Section 3548.5 provides:

> A public school employer and an exclusive representative who enter into a written agreement covering matters within the scope of representation may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application or violation of the agreement.

This section imposes no limitation on parties' ability to agree to final and binding arbitration on matters specified in their agreements, and it certainly does not expressly prohibit binding arbitration over discipline. Instead, the section plainly specifies that parties may negotiate arbitration clauses over all the negotiable matters that have been covered within their collective agreements.

There can be little question about the Legislature's reasons for providing for binding arbitration of contractual disputes. In 1972, the Legislature created the Assembly Advisory Council on Public Employee Relations (Aaron Commission) to formulate recommendations "for establishing an appropriate framework within which disputes can be settled between public jurisdictions and their employees." (Assem. Res. No. 51 (1972 Reg. Sess).) In March of 1973, the Legislature received the Aaron Commission Report which, inter alia, summarized why binding arbitration of contractual

disputes is an imperative component of the collective negotiations model. Initially, the report discussed the necessity of contractually-prescribed grievance procedures:

> Grievance handling ... is an integral part of the bilateral relationship. ... [T]he scope of the negotiated grievance procedure is inseparable from the scope of the collective bargaining agreement and of the bilateral decision-making process. Aaron Commission Report, p. 103.

The report then dealt specifically with the question of binding arbitration, noting that arbitration of contractual disputes is

> . . . the established method of resolving disputes over the meaning of collective agreements in the private sector. This process has commended itself to management and labor by reason of its relative speed and low cost, plus the expertise which experienced arbitrators are able to bring to bear on the resolution of such problems. (Aaron Commission Report, ante, fn. 1, at pp. 177-178.)

Moreover, in 1965, when the Education Code was amended to add the language on which the District's argument exclusively relies, i.e., that governing board determinations of the sufficiency of cause of discipline shall be "conclusive,"[28] public school employees had extremely limited representational rights, and their employers' ability to seek bilateral resolution of employment concerns was similarly circumscribed.

28section 45113 derived from former Education Code section 13583, which was enacted in 1959. In 1965 section 13583 was repealed and reenacted to contain the disputed language.

During that year, public school employment relations were removed from coverage under the George Brown Act (Government Code section 3500 et seq.) and were simultaneously placed under the newly-enacted regulatory scheme of the Winton Act (Education Code sections 13080-13089, repealed Stats. 1975, Ch. 961, section 1, operative July 1, 1976).

The Winton Act did not embody the concepts of collective bargaining and exclusive representation. Significantly, public school employers were precluded, under the Winton Act, from entering into binding agreements with labor organizations representing school employees29 and, thus, could not enter into agreements providing for binding arbitration of disputes arising from collective agreements.[30]

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[29]See San Mateo City School District et al v. PERB, supra at p. 860-861; City and County of San Francisco v. Cooper, supra, at pp. 925-930, 932; San Juan Teachers Association v. San Juan Unified School District, supra; Grasko v. Los Angeles City Board of Education (1973) 31 Cal.App.3d 290, 300; Grodin, Public Employee Bargaining in California; The Meyers-Milias-Brown Act in the Courts, supra, 23 Hastings Law Journal 757; Grodin, California Public Employee Bargaining Revisited; The MMB Act in the Appellate Courts, California Public Employee Relations No. 21 (June 1974), p. 13).

[30]In the collective bargaining setting, the legality of delegation of public sector decisional authority to labor arbitrators became a matter of national interest only in 1967—two years after the amendment of section 45113—when the Wisconsin Supreme Court decided State, County & Municipal Employees, Local 1226, Rhinelander City Employees v. City of Rhinelander (1967) 35 Wis.2d 209 [151 N.W.2d 30, 65 LRRM 2793]. In that case, the Wisconsin Court held that arbitration of a discharge dispute was not an "unlawful infringement upon the . . . power of the city. . . ." Id. at

Furthermore, until 1976,[31] school districts' authority lawfully to act was already exceedingly limited. School districts were permitted to act only in areas which were specifically authorized by the Legislature. Grasko v. Los Angeles City Board of Education, supra, at pp. 300-301, and cases cited therein; 65 Ops.Atty.Gen. 326, 327, citing Grasko, supra. Accordingly, delegation of school district disciplinary authority to a third party would have been unlawful at that time, inasmuch as it was neither expressly nor by necessary implication authorized by statute.

2797. One year later, the California Supreme Court issued the landmark case of Kugler v. Yocum, supra, 69 Cal.2d 371, 381-382. While Kugler did not address the specific question of delegability in the labor relations arena, it did hold that delegation of municipal corporation power is proper so long as the legislative body retains the power to make decisions on fundamental policy, and so long as sufficient safeguards prevent abuse of the delegated authority. (Cf. Bagley v. City of Manhattan Beach (1976) 18 Cal.3d (general law city cannot delegate the policy making power to set salaries to an arbitrator).) It was more than a decade later that the California Supreme Court decided Taylor v. Crane, supra, which held, inter alia, that a city may lawfully delegate review of disciplinary authority to an arbitrator.

[31]In response to voter approval of Proposition 5 in 1972, the Legislature enacted Education Code section 35160, which provides:

> On or after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

In light of this history, a statutory provision in 1965 prohibiting disciplinary arbitration would have been anomalous and unnecessary. Further, had the Legislature—out of an abundance of caution and concern over the status of the law in this area—wished to proclaim the prohibition posited by the District, it would have done so expressly and unequivocally within the Winton Act itself.

Rather, we believe the Legislature's utilization of the term "conclusive" in Education Code section 45113 was intended for the sole purpose of limiting judicial review of governing board determinations on the "sufficiency of cause for discipline." This conclusion is borne out by a review of California Supreme Court decisions interpreting similar language in Education Code section 44949.32 Like section 45113, section 44949 prescribes procedures to be followed by school districts in establishing disciplinary policies, but extends certain procedural guarantees to probationary certificated employees. Education Code section 44949 provides, in relevant part:

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[32]Historically, this section derived from former Education Code sections 13443 and 13444, which were enacted in 1959 and amended in 1961. Section 13444 was repealed in 1965 and incorporated in pertinent part into section 13443. Section 13443 was further amended without substantive change as to its relevant language in 1965, 1970, 1971 and 1973 prior to being recodified as Education Code section 44949 in 1976. The critical language concerning "conclusiveness" as to "sufficiency of cause" for discipline has not been altered since the Legislature originally enacted these provisions in 1959.

> (d) The governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and pupils thereof. (Emphasis added.)

In a series of decisions construing former Education Code sections 13443 and 13444, the California Supreme Court has unambiguously resolved the question as to what the Legislature intended the disputed phrase to mean (Turner v. Board of Trustees (1976) 16 Cal.3d 818 [129 Cal.Rptr. 443, 548 P.2d 1115] ; Lindros v. Governing Bd. of the Torrance Unified School District (1973) 9 Cal.3d 524 [108 Cal.Rptr. 185, 510 P.2d 361]; Griggs v. Board of Trustees (1964) 61 Cal.2d 93 [37 Cal.Rptr. 194, 389 P.2d 722].)

In the most recent case Turner v. Board of Trustees, supra, at 824, the court said:

> By providing that the school board's determination of the sufficiency of the cause is conclusive, the Legislature has foreclosed judicial evaluation of the gravity of misconduct of probationary teachers. Under subdivision . . . (d), once misconduct relating to the schools and their pupils is established, it is within the school board's discretion to determine whether the cause is sufficiently serious to warrant a refusal to rehire and whether the teacher's other qualities justify reemployment. (Citations omitted.) (Emphasis added.)

In the words of the Griggs court:

> . . . [W]here there is evidence to support the board's findings of fact and where the

> cause for dismissal found by the board can reasonably be said to relate to the "welfare of the schools and the pupils thereof," the reviewing court may not consider whether the facts found are sufficiently serious to justify dismissal. (Emphasis added.) Griggs v. Board of Trustees, supra, at p. 96.

This construction of the "conclusive" language in former section 13443 must be accorded central significance in any interpretation of the same language in section 45113. It is a cardinal principle of statutory construction that where

> . . . legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 73 [160 Cal.Rptr. 745, 603 P.2d 134].

Based on the foregoing reasons, the District's interpretation of section 45113 must be rejected. The term "conclusive" in the context of Education Code disciplinary procedures has never been construed as meaning "non-delegable." Instead, the established judicial construction has consistently held that the term refers only to a limitation on judicial review of governing board determinations of the sufficiency of cause for discipline.

This construction also gives significance to all components of the statute in pursuance of the legislative purpose (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645). Because disciplinary arbitration, authorized by section

3548.5, can coexist harmoniously with our construction of Education Code section 45113 (San Mateo, supra, at pp. 864-865), we reject the District's supersession argument and find that the subject of disciplinary arbitration is negotiable.[33]

Article XXIV. Working Conditions

24.1 Past Practices; The rules, regulations, policies and practices of the District which are in effect at the time of this Agreement and which neither conflict with terms of this Agreement nor abridge the rights of employees under this Agreement shall remain in full force and effect unless changed by mutual agreement of CSEA and the District.

Proposal 24.1 seeks to incorporate into the agreement all existing policies and past practices not specifically negotiated. Since the proposal could affect some policies and practices which are outside the scope of representation, it is overbroad. However, since the proposal may be narrowed to bring it within the scope of representation, the District is obligated to seek clarification at the bargaining table.

24.4 Special Trip Assignments: Special trip assignments shall be distributed and rotated as equally as possible among bus drivers in the bargaining unit.

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[33]Our ruling today does not purport to resolve the myriad questions which may be presented, in future cases, concerning the negotiability of particular disciplinary arbitration proposals. For example, a given proposal might fail to guarantee employees the option to follow traditional Education Code disciplinary procedures in the event the exclusive representative chooses not to arbitrate a given disciplinary dispute. (See discussion of a related point in Grodin, Public Employee Bargaining in California; The Meyers-Milias-Brown Act in the Courts, 23 Hastings Law Journal 719, 757, fn. 172 and accompanying text.) Such a proposal might implicate supersession concerns.

24.5 Standby Time;

24.5.1 Bus drivers on special trips including but not limited to athletic events, field trips, and curricular trips who are required to remain on standby for the duration of the event for which the special trip is made, shall be paid for all standby hours at their regular rate of pay. Whenever any combination of driving and standby hours in a day exceeds the established workday as defined in Section 8.1, all excess hours shall be compensated at the appropriate overtime rate based on the employee's regular pay rate.

24.5.2 Notwithstanding any other provisions of this Agreement, if a special trip requires an overnight stay, the District shall be relieved of the obligation of payment for any hours between the time a bus driver is relieved of duties for the evening and the time duties resume the following morning.

24.6 Vehicle Unavailability: Whenever as the result of the unavailability of appropriate District vehicles due to mechanical or other malfunctions a bus driver regularly scheduled to work is unable to work, he/she shall receive pay at the rate he/she would have received for working that day.

Proposal 24.4 concerns the establishment of a procedure for making "special trip" assignments to bus drivers. The Board has previously found that the procedure for making work assignments to bus drivers is negotiable. Pittsburg Unified School District (3/15/82) PERB Decision No. 199; Anaheim City School District, supra. We, therefore, find this proposal negotiable.

Proposals 24.5.1, 24.5.2, and 24.6 all relate directly to the wages and hours of work of District bus drivers. The District concedes that these proposals are negotiable, and we so hold.

Article XXVI. Training

26.1 In-service Training Program The District shall provide a program of in-service training for employees in the bargaining unit designed to maintain a high standard of

performance and to increase the skills of employees in the bargaining unit.

Proposal 26.1 requires the District to provide in-service training for employees. Although not specifically enumerated, in-service training is logically and reasonably related to several enumerated subjects. Training that is necessary to insure employees' safety is negotiable since it relates to safety, an enumerated subject. Also, since training may have an impact on job performance of employees, it is related both to evaluation and grievance procedures and, therefore, potentially to wages as well.

Training is of great concern to employees, since it may affect promotional opportunities and job safety. It is also of great significance to management, since training helps maintain a high level of employee performance, thereby affecting the quality of services which are delivered to the public. It is, therefore, an appropriate subject for the negotiation process.

Finally, we can find no managerial prerogative which would be unreasonably interfered with if the District were required to negotiate over the subject of in-service training. Therefore, we find proposal 26.1 negotiable.

26.2 Training Advisory Committee; A training advisory committee composed of six (6) employees in the bargaining unit to be selected by CSEA from the following classifications: Cafeteria, Clerical, Custodial, Instructional Aides, Maintenance, Transportation and two (2) members appointed by the District shall be formed. The purpose of the advisory committee will be to plan in-service training programs, to monitor the programs, and to provide recommendations concerning

improvement of programs. Bargaining unit employees shall be granted reasonable release time to carry out the committee obligations.

This proposal seeks to establish an advisory committee to plan, monitor, and provide recommendations concerning improvement of an in-service training program. In addition, it requires the District to grant release time to employees who participate on the committee.

We find this proposal to be inextricably bound up with the implementation of the Association's proposal for an in-service training program, and it is, therefore, negotiable. Since, by its terms, the committee to be established will be "advisory," the Association's proposal does not interfere with management's right to structure its services. That portion of the proposal which requires the District to grant release time to employees who serve on the advisory committee is negotiable for the reasons discussed, supra, with respect to the Association's release time proposal.

26.3 In-Service Training Time: In-service training shall take place during regular working hours at no loss of pay or benefits to employees.

26.4 Reimbursement for Tuition: The District shall reimburse employees for the tuition costs of any and all training programs approved by the training advisory committee.

These two proposals regarding training are negotiable because, by their terms, they directly concern wages and hours of employees. Training during work hours without loss of pay and reimbursement for approved program costs are traditional

and common features of in-service training programs which do not, in any way, conflict with managerial prerogatives.

Article XXVII. Contracting and Bargaining Unit Work

27.1 Restriction on Contracting Out; During the life of this agreement, the District agrees that it will not contract out work which has been customarily and routinely performed or is performable by employees in the bargaining unit covered by this agreement unless CSEA specifically agrees to same or contracting is specifically required by the Education Code.

27.2 Notice to CSEA: No contract for services which might affect employees in the bargaining unit shall be let until CSEA has been provided 10 days advance notice of the award.

27.3 Bargaining Unit Work: No Supervisory or Management employee may perform any work within the job description of a bargaining unit employee.

Proposal 27.1 provides that the District will not contract out for services performable by bargaining unit employees unless the Association specifically consents to such subcontracting or the District contracts out in a manner consistent with the Education Code.

In Arcohe Union School District, supra, the Board found that the general subject of subcontracting was within the scope of representation under EERA. However, the Board noted that in California School Employees Association v. Willits Unified School District of Mendocino Co. et al. (1966) 243 Cal.App.2d 776 [52 Cal.Rptr. 765], the Court of Appeal held that under section 13581 (now section 45103) of the Education Code,[34]

[34]Education Code section 45103 provides, in relevant part:

> The governing board of any school district shall employ persons for positions not

janitorial services may not be subcontracted, but must be performed by a district's classified employees. Since the Board found that this section, as interpreted by the Willits Court, created an "inflexible standard," it concluded that the subject of subcontracting was, at least, partially preempted by the Education Code. The Board was careful to note, however, that while a proposal to subcontract would be nonnegotiable under Willits, a proposal prohibiting subcontracting or which otherwise restated the provisions of the Education Code would be negotiable.

Proposal 27.2 requires the District to provide CSEA with notice prior to implementing any decision to contract out work. Since, under Arcohe Union School District, supra, the subject of subcontracting is negotiable, the District has an affirmative duty to provide the Association with notice and a reasonable opportunity to negotiate prior to taking unilateral action on a matter within the scope of representation. San

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> requiring certification qualifications. The governing board shall . . . classify all such employees and positions. The employees and positions shall be known as the classified service. Substitute and short-term employees, employed and paid for less than 75 percent of a school year, shall not be a part of the classified service. Part-time playground positions, apprentices and professional experts employed on a temporary basis for a specific project, regardless of length of employment, shall not be a part of the classified service. . . .

Mateo Community College District (6/8/79) PERB Decision No. 94. This proposal merely restates that duty and, as such, is negotiable.

Proposal 27.3 prohibits the District from transferring out bargaining unit work to non-unit members. As noted, supra, the Board has specifically held that the transfer of work out of the bargaining unit is within the scope of representation. Rialto Unified School District, supra; Solano County Community College District, supra; Mt. San Antonio Community College District, PERB Decision No. 334, supra. The Association's proposal is, therefore, negotiable.

REMEDY

Based on the foregoing discussion, we conclude that the Districts unlawfully refused to negotiate with CSEA those proposals found to be within the scope of representation. Such conduct constitutes a violation of subsection 3543.5(c) and, concurrently, subsections 3543.5(a) and (b). San Francisco Community College District, supra.

Specifically, to the extent noted in the discussion of each Article and the portions thereof, the Districts are required to negotiate as to the following subjects:

Article II.	No Discrimination
Article V.	Organizational Rights
Article VI.	Job Representatives
Article X.	Employee Expenses and Materials

Article XI. Rights of Bargaining Unit Upon Change in School Districts

Article XVII. Hiring

Article XIX. Promotion

Article XX. Classification, Reclassification, Abolition of Positions

Article XXI. Layoff and Reemployment

Article XXII. Disciplinary Action

Article XXIV. Working Conditions

Article XXVI. Training

Article XXVII. Contracting and Bargaining Unit Work

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this case, and pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that the Healdsburg Union High School District and the Healdsburg Union School District shall:

A. CEASE AND DESIST PROM:

(1) Failing and refusing to meet and negotiate in good faith with the California School Employees Association with regard to: discrimination; organizational rights; job representatives; employee expenses and materials; rights of bargaining unit upon change in school districts; hiring; promotion; classification, reclassification, and abolition of positions; layoff and reemployment; disciplinary action;

working conditions; training; and contracting and bargaining unit work.

(2) Interfering with the right of employees to be represented by failing and refusing to negotiate in good faith.

(3) Denying the California School Employees Association the right to represent employees by failing and refusing to negotiate in good faith.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(1) Upon request, meet and negotiate in good faith with the California School Employees Association with respect to those subjects enumerated above to the extent that we have determined them to be within the scope of representation.

(2) Within thirty-five (35) days following the date of service of this Decision, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

(3) Written notification of the actions taken to comply with this Order shall be made to the Regional Director of the Public Employment Relations Board in accordance with her instructions.

This Order shall become effective immediately upon service of a true copy thereof upon the Healdsburg Union School District and the Healdsburg Union High School District.

Member Burt joined in this Decision.

Chairperson Gluck's concurrence and dissent begins on page 91.
Member Tovar's concurrence and dissent begins on page 98.
Member Morgenstern's concurrence and dissent begins on page 104.

The Decision in San Mateo City School District, Case No. SF-CE-36 begins on page 106.

GLUCK, Chairperson, concurring and dissenting: I concur in the reasoning and conclusions reached by the majority except as to those proposals hereafter individually considered. As to these latter matters, in some instances I am unable to reach the same result as do my colleagues; in others, I reach the same conclusion, albeit by somewhat different routes.

The Board has been urged to consider the phrase "matters relating to" found in section 3543.2 as virtually without purpose; it has been suggested that the meaning of the words has been stretched to the point where the scope limitation implicit in the enumeration of specific subjects is ignored. I do not subscribe to those complaints although I acknowledge the possibility that the phrase can, in good faith, be applied to particular subjects with different results. Virtually every aspect of employment is related in some way to those that are negotiable as elements of a total configuration of employment terms and conditions. For example, hours are "tied" to wages, as are benefits as part of compensation; promotions and discipline surely have wage implications as well as a relationship to the efficiency of supervision.

When the "reasonable and logical" criterion was incorporated into the Anaheim test, it was my understanding that these ordinary words were meant to answer the question whether this Board, as the expert body charged with that responsibility, would recognize a relationship between the

subject matter of a disputed proposal and an item enumerated in section 3543.2 which warrants the conclusion that the Legislature intended that it be subject to negotiations.

Further, it is my view that virtually any matter within the jurisdiction of a school board may lead to some confrontation with some of its employees. The question is how the second step of the Anaheim test is to be applied so as not to render it meaningless. I believe that the answer must be given on a case by case basis, examining the specific proposals in terms of the reasonable likelihood that failure to deal with the subject matter involved will be adverse to the maintenance of harmonious employer-employee relations.

In differing with the majority either as to its conclusions or rationale, I am guided by these considerations.

Proposal 5.4: I find this proposal to be out of scope. The process of collective negotiations consists, in its most elemental parts, of the right of employees to organize for exclusive representation, to participate in good faith negotiations, and to assure the proper administration of the negotiated agreement. At the very core of this sometimes complex system, is the legislative determination that in the interest of improved employer-employee relations, decisions on wages, hours and certain conditions of employment are best effected through the bilateral process. It is by the process of contract administration that the employees and their

representative can enforce the wage, hour and working condition arrangements to which the parties have agreed. It therefore follows, in my judgment, that contract administration necessarily bears a reasonable and logical relationship to all negotiated subjects. It is for this reason that I would find that proposals which specifically attempt to provide reasonable means and procedures by which the exclusive representative can effectively administer the agreement are subject to mandatory negotiations unless barred by some other aspect of the Anaheim test.

Here, although the distribution of copies of the agreement would enhance the employees' awareness of its provisions and, thus, their rights and obligations, the requirement that the District print and distribute those copies at its own expense seems to have little relationship to CSEA's administrative needs. Indeed, the proposal tends to shift at least one aspect of the burden of representation to the employer. I find this proposal out of scope.

Proposals 5.1.4, 5.1.5, 5.1.9; I conclude that these proposals are negotiable as reasonably necessary for the administration of the parties' contract, and therefore bearing a reasonable and logical relationship to the negotiable matters contained therein.

Proposal 17.5; The proposal requires the District to provide the employees with certain basic information pertaining

to their employment status. Some of the information would concern employee entitlements and employer-employee obligations arising out of negotiations; other information might reflect matters established unilaterally by the employer. Providing such information to the employees is eminently in keeping with EERA's stated purpose of improving personnel administration through the process of collective bargaining. To the extent that the proposal requires publication of information concerning wages, hours and negotiable working conditions, the reasonable and logical relationship of the proposal to those matters is self-evident.

Proposal 21.3; This proposal is virtually meaningless except in its relation to other proposals included in Article XXI. To the extent other subdivisions of the article are negotiable, 21.3 must be considered within scope.

Proposals 21.10 and 21.10.5; At first blush, it is difficult to reconcile the majority's finding as negotiable a proposal giving the employee the right to elect retirement in lieu of layoff with its holding elsewhere that the employer's decision to lay off is not negotiable. But when it is recognized that in either event it is the employer's not negotiable decision that the employee be terminated, the majority logic seems faultless, at least where there is no evidence that the employer's obligation to a retired employee is greater than that to one laid off. To the extent that that

is true here, and the proposal seems to make that certain, I concur.

Proposal 21.11; I find this proposal, as written, to be not negotiable. In its effort simply to compel the District to maintain a certain record, it impermissibly interferes with the employer's internal administrative operations. Had the proposal required the District to publish such a list for the benefit of the employees, as was the case with Proposal 17.5, or had it required preparation of such a list for the use of the exclusive representative in connection with a grievance, layoff, or some event to which the list would have some relevance, the result here would be different. Although it might be argued that the proposal relates to contract administration, its failure to suggest any purpose, coupled with the arbitrary nature of that portion which gives CSEA the absolute right to demand an updated list at any time, renders its relationship to an enumerated subject too speculative to be deemed reasonable and logical.

Proposal 22.2.2; I find that part of the proposal which gives the employees the option of requesting a transfer in addition to the right of appeal from disciplinary warning to be not negotiable. The argument is made that because the District is not obligated to grant the transfer, its essential prerogatives are preserved, and therefore the subject is negotiable. To follow this reasoning to its conclusion would

render Anaheim*s third criterion — which exempts the employer from the obligation to negotiate on such privileged matters — meaningless; any proposal would be in scope so long as it included an escape hatch through which the employer could avoid taking action.

The employer's unquestioned right to maintain discipline in the work place requires that it be given some reasonable freedom to impose discipline even though the precise nature of that discipline be subject to bargaining. A proposal which would require the employer to consider transferring an employee whose conduct has merited disciplinary warning (a requirement that it would certainly have to approach in good faith), inherently tends either to place responsibility for the employee's objectionable conduct at the feet of his or her supervisor or concede that the employee is incapable of satisfactory performance in his or her current assignment. The first would interfere with the employer's freedom to make its own judgments concerning its supervisory and managerial cadre; the second would interfere with its freedom to assign its personnel according to its own needs and own best judgment.

Proposal 26.1; I find this proposal to be not negotiable. Although it can be claimed that the training called for here bears some relationship to one or more enumerated items, I find that relationship too attenuated to be convincing. Training may result in better evaluations, better evaluations may result

in less reason for discipline, less discipline may result in less loss of wages, and ad infinitum. This is not to say that a training proposal will always be not negotiable. A proposal to require corrective training following a poor evaluation or disciplinary action demonstrates the relationship Anaheim contemplates. Here, as it is written, CSEA simply seeks to compel negotiations on a proposal which would determine the content of the employees' working-hour assignments, a prerogative I view as the employer's.

Proposal 26.2; Although the matter of released time, relating clearly to both hours and wages, would normally be negotiable, to the extent that this proposal depends upon the negotiability of Proposal 26.1, it must fall with it.

Proposal 26.3; I perceive this proposal as independent of those in the previous proposals in Article XXVI. As such, it avoids the defect of Proposal 26.1 in that it would specifically require that any training offered by the District be conducted during regular working hours, i.e., that it not require the attendees to work additional hours or lose pay or benefits when released for that purpose from normal assignments. These specific references bring the proposal within mandatory scope.

TOVAR, Member, concurring and dissenting: While I generally concur in the majority's treatment of the scope of representation issues presented in this case, I find myself in disagreement with respect to two matters. Thus, I would find the subject of affirmative action policy, addressed at proposal 2.3, to be outside the scope of collective negotiation. Affirmative action is a critical matter of public policy which must be reserved to the control of public representatives rather than being subjected to the compromising processes of collective bargaining.

By statute, California's public school districts have been mandated to devise and implement programs which will give effect to the principles of affirmative action as established by the Legislature. At Education Code sections 44100-44105 (applicable to school districts) and 87100-87106 (applicable to the community college districts) the Legislature has codified the duty of the educational institutions to carry out the affirmative action mission imposed on those institutions by the people of California. At section 44101, and again at section 87101, the following definition of "affirmative action employment program" is given:

> "Affirmative action employment program" means planned activities designed to seek, hire, and promote persons who are under represented in the work force compared to their number in the population, including handicapped persons, women, and persons of minority racial and ethnic backgrounds. It is a conscious, deliberate step taken by a hiring authority to assure equal employment

> opportunity for all staff, both certificated and classified. Such programs require the employer to make additional efforts to recruit, employ, and promote members of groups formerly excluded at the various levels of responsibility who are qualified or may become qualified through appropriate training or experience within a reasonable length of time. Such programs should be designed to remedy the exclusion, whatever its cause. Affirmative action requires imaginative, energetic, and sustained action by each employer to devise recruiting, training, and career advancement opportunities which will result in an equitable representation of women and minorities in relation to all employees of such employer. (Emphasis added.)

This Board has always recognized that certain operational matters which are essential to the heart of the school employer's mission must be reserved to the exclusive control of the public's representative. It has been agreed that such matters, which we have called "managerial prerogatives," are not appropriately subjected to the compromising process of collective bargaining, notwithstanding the fact that decisions in these areas may have profound effects on the working conditions of employees.

In my view, the public and legal mandate for an affirmative action policy requiring "imaginative, energetic and sustained action" of each school employer cannot be reconciled with the collective bargaining process. The mission of affirmative action imposed by the Legislature simply cannot accommodate the limitations posed by the EERA's collective negotiating scheme.

I am especially concerned that the negotiation of affirmative action matters - even where, as here, only consultation rights are proposed - will unacceptably encumber the process of setting goals and timetables for affirmative action programs. At Education Code section 44102, and again at section 87102, it is mandated that:

> Each local public education agency shall submit . . . to the Department of Education an affirmation of compliance with the provisions of this article. The affirmative action employment program shall have goals and timetables for its implementation.

"Goals and timetables" are defined at Education Code sections 44102 and 87102:

> "Goals and timetables" means projected new levels of employment of women and minority racial and ethnic groups to be attained on an annual schedule, given the expected turnover in the work force and the availability of persons who are qualified or may become qualified through appropriate training or experience within a reasonable length of time.

In my experience, goals and timetables are the key to the implementation for an effective affirmative action plan. This is the operational tool by which the personnel will ultimately be shaped to reflect the representation of protected groups in the labor force. I have also experienced the process of consultation between management and employee organizations on the subject of affirmative action goals and timetables. It is based upon this experience that I am firmly convinced that subjecting affirmative action matters to negotiation would

unacceptably impede management's ability to comply with the lawfully mandated affirmative action programs set forth in the Education Code.

To further illustrate my concern, I refer to the current national controversy regarding the accommodation between seniority principles and affirmative action. In the instant case, CSEA's proposals include extensive guarantees of preference based on seniority. As a general proposition, of course, I support this principle. However, the legislative mandate for affirmative action may at some point require that these seniority provisions must be preempted. Inasmuch as the people of California, through their Legislature, have decided that its school districts shall observe affirmative action principles, I cannot find that the school districts must compromise this mandate by subjecting their authority to implement an affirmative action program to negotiations.

I have a greater concern, however, than my above-explained view that the majority has transgressed on a managerial prerogative. The subjects of wages, hours and other basic working conditions are matters in which it may fairly be said that the employer and the employee have equal, if opposing, interests. Collective bargaining over such matters, then, is hardly a radical notion of modern invention; rather it simply gives effect to the ancient Anglo-American legal principles which recognize that a fair contract can only be made where

both parties have some say in deciding on the terms of the agreement. Where one side can flatly dictate to the other the terms by which they will do business, it is termed "a contract of adhesion" and universally recognized as unfair. Indeed, in some jurisdictions it may be unenforceable. Thus, I am a proponent of collective bargaining with respect to terms of employment, as a process by which the legitimate equal interests of employer and employee may be accommodated and the contract of adhesion averted.

However, the principle of affirmative action is not simply another term of employment in which the employer and the employee share equal interests. It is a matter of social policy, and as such, is reserved to the province of the people of this society as a whole.

I find it undemocratic and entirely inappropriate that the millions of California citizens should be required to negotiate with a few thousand individuals on an equal footing over the social policy of the state. I cannot concede that the status of the few as employees of the public school districts entitles them to a disproportionate say in such public matters.

Under the Anaheim test, a particular matter will be found within the scope of representation only if:

> the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict.

In my view, the parties do not share equal degrees of interest in the subject of affirmative action. The process of collective negotiations is therefore not "the appropriate means of resolving . . . conflict" between them. Finding that affirmative action is not merely a term of employment but instead a matter of public policy, I conclude that this subject is appropriately reserved to the public's representative.

The other matter as to which I differ with the majority is proposal 21.11. For the reasons set forth in his separate concurrence and dissent, I join Chairperson Gluck in finding CSEA's proposal for an unlimited right to seniority lists upon demand to be outside the scope of representation.

MORGENSTERN, Member, concurring and dissenting: I am at odds with the majority's opinion regarding the following two proposals at issue in the Healdsburg case:

5.4 Distribution of the Contract

Unlike the majority, I would conclude that this proposal bears a logical and reasonable relationship to negotiable items. As stated with regard to the proposals seeking use of District equipment and facilities and review of District materials, this proposal relates to the ongoing collective bargaining process and the grievance procedure. The fact that this proposal, if agreed to, would impose a financial burden on the District does not disturb that relationship. Indeed, the majority finds those proposals dealing with employee uniforms, tools, storage places and, most relevantly, the provision of job descriptions and specifications, to be negotiable in spite of any financial obligation that would ensue.

21.7 Equal Seniority

I share the majority's conclusion that proposal 21.7 is negotiable. I do not, however, agree with their rationale which is based on a distinction between the language of Education Code section 45308, relevant here as pertaining to classified employees, and section 44955, which pertains to certificated employees. See my dissenting opinion in Mt. Diablo Unified School District (12/30/83) PERB Decision No. 373, in which I found that Education Code section 44955 poses

no impediment to the negotiability of a proposal concerning order of layoff among certificated employees with the same date of hire.

With these two exceptions noted, I concur with the majority's decision.

II.

SAN MATEO CITY SCHOOL DISTRICT, CASE NO. SF-CE-36

This case arose from charges filed by the San Mateo Elementary Teachers Association, CTA/NEA (SMETA), in which it alleged that the District violated subsection 3543.5(c) of the Act by making unilateral changes in the length of the instructional day and the amount of preparation time afforded certificated employees.[1]

FACTS

It is undisputed that, during the 1976-77 and 1977-78 negotiations, the District unilaterally adopted policies which increased the length of the teachers' instructional day and decreased the amount of teacher preparation time. In its answer to the charge and during the hearing below, the District contended that these changes were not negotiable. In its submission on remand filed with the Board on August 24, 1983, however, the District asserts that the parties did negotiate over and reach agreement on these issues after the hearing officer's proposed decision issued on January 10, 1978. It is the District's position that, based on these negotiations and agreements, the issues that were originally in dispute "have

[1]The Association's initial charge alleged that the District refused to negotiate over changes in rest time. The record, however, does not show that the District refused to negotiate over this subject. Since the District did not refuse to negotiate rest periods, the negotiability of that issue is not addressed herein.

been resolved to the satisfaction of the parties." The District indicates, however, that because of the pendency of litigation over these issues, it did not comply with PERB's previous order to post a notice indicating that its unilateral changes violated the Act.

DISCUSSION

Mootness The District's submission on remand may be read to suggest that the instant case is moot in light of the parties[1] subsequent negotiations and agreement on the disputed issues. Any such assertion must be rejected. The mere execution of a collective bargaining agreement subsequent to a hearing "certainly does not lead to a conclusion that the parties intended in that agreement to resolve the dispute." Oakland Unified School District v. PERB, supra, (1981) 120 Cal.App.3d 1007, 1010, affirming Oakland Unified School District, supra, PERB Decision No. 126. To warrant a finding of mootness, the collective agreement must show that the charging party has "clearly and unmistakably" waived its right to proceed on the charge. (Timken Roller Bearing Company v. NLRB (6th Cir. 1963) 325 F.2d 746, 751, cited in Oakland Unified School District, supra, PERB Decision No. 126, at p. 1011; Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74.)

Despite the District's assertion that the charges in this case "have been resolved to the satisfaction of the parties,"

the parties' agreement does not contain any language evincing an intent by the Association to waive its right to proceed with the pending charges; nor has the Association concurred in the District's claim that the parties have satisfactorily resolved the matter. Thus, under the Oakland rule, any argument that the case was rendered moot by later negotiations and agreement must be rejected.

The District's Unilateral Changes. The Board has long held that a per se violation of the duty to negotiate in good faith may occur when an employer unilaterally alters an established policy concerning a matter within the scope of representation without providing notice and a reasonable opportunity to negotiate to the exclusive representative. Grant Joint Union High School District, supra; Pajaro Valley Unified School District, supra; NLRB v. Katz, supra. (Also see Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191, 199-200, citing with approval the Board's reasoning, in San Mateo Community College District, supra, for finding unilateral changes to be per se unfair practices.)

In Sutter Union High School District (10/7/81) PERB Decision No. 175, the Board held that preparation time is negotiable. That decision has been reaffirmed in a number of subsequent decisions (Moreno Valley Unified School District, supra; Modesto City Schools (3/8/83) PERB Decision No. 291; Grossmont Union High School District (5/26/83) PERB Decision No. 313), and we so hold today.

Similarly, the Board has held that the length of the teachers' instructional day is within the scope of representation (Sutter Union High School District, supra; Moreno Valley Unified School District, supra; Jefferson School District, supra) and we also reaffirm that holding.

We, therefore, find that the District violated subsection 3543.5(c) and, concurrently, subsections 3543.5(a) and (b) when it unilaterally increased the length of the teachers' instructional day and decreased preparation time. San Francisco Community College District, supra.

To remedy the District's unilateral actions, we find it appropriate to order the District to post a notice to employees indicating that its unilateral conduct violated the EERA. We also find it appropriate to order the District, upon request, to reinstate the amount of preparation time granted to certificated employees prior to January 1, 1977 and to meet and negotiate the issues of preparation time and the length of the teachers' instructional day.

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this case, and pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that the San Mateo City School District and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the San Mateo Elementary Teachers Association, CTA/NEA, with respect to teacher preparation time and length of the teachers' instructional day.

(2) Interfering with the rights of employees to be represented by failing and refusing to meet and negotiate in good faith.

(3) Denying the San Mateo Elementary Teachers Association, CTA/NEA, the right to represent employees by failing and refusing to meet and negotiate in good faith.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(1) Reinstate the schedule with respect to preparation time and length of the teachers' instructional day that was in effect prior to January 1, 1977, if the Association so requests.

(2) Upon request, meet and negotiate in good faith with the San Mateo Elementary Teachers Association, CTA/NEA, with respect to preparation time and length of the teachers' instructional day.

(3) Within thirty-five (35) days following the date of service of this Decision, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized

agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

(4) Written notification of the actions taken to comply with this Order shall be made to the Regional Director of the Public Employment Relations Board in accordance with her instructions.

This Order shall become effective immediately upon service of a true copy thereof upon the San Mateo City School District.

By the BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-68, California School Employees Association v. Healdsburg Union School District and Healdsburg Union High School District, in which all parties had the right to participate, it has been found that the Healdsburg Union School District violated the Educational Employment Relations Act, Government Code subsections 3543.5(a), (b) and (c) by failing and refusing to meet and negotiate in good faith with the California School Employees Association.

As a result of this conduct, we have been ordered to post this notice and we will:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the California School Employees Association with regard to: discrimination; organizational rights; job representatives; employee expenses and materials; rights of bargaining unit upon change in school districts; hiring; promotion; classification, reclassification, and abolition of positions; layoff and reemployment; disciplinary action; working conditions; training; and contracting and bargaining unit work.

(2) Interfering with the rights of employees to be represented by failing and refusing to meet and negotiate in good faith.

(3) Denying the California School Employees Association the right to represent employees by failing and refusing to meet and negotiate in good faith.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(1) Upon request, meet and negotiate in good faith with the California School Employees Association with respect to those subjects enumerated above to the extent that we have determined them to be within the scope of representation.

Dated: HEALDSBURG UNION SCHOOL DISTRICT

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF THE POSTING AND MUST NOT BE DEFACED, ALTERED, REDUCED IN SIZE OR COVERED BY ANY OTHER MATERIAL.

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As a result of this conduct, we have been ordered to post this notice and we will:

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(2) Interfering with the rights of employees to be represented by failing and refusing to meet and negotiate in good faith.

(3) Denying the California School Employees Association the right to represent employees by failing and refusing to meet and negotiate in good faith.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(1) Upon request, meet and negotiate in good faith with the California School Employees Association with respect to those subjects enumerated above to the extent that we have determined them to be within the scope of representation.

Dated:

HEALDSBURG UNION HIGH SCHOOL DISTRICT

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF THE POSTING AND MUST NOT BE DEFACED, ALTERED, REDUCED IN SIZE OR COVERED BY ANY OTHER MATERIAL.

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As a result of this conduct, we have been ordered to post this notice and we will:

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(2) Interfering with the right of employees to be represented by failing and refusing to meet and negotiate in good faith.

(3) Denying the San Mateo Elementary Teachers Association, CTA/NEA, the right to represent employees by failing and refusing to meet and negotiate in good faith.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(1) Reinstate the schedule with respect to preparation time and length of the teachers' instructional day that was in effect prior to January 1, 1977, if the Association so requests.

(2) Upon request, meet and negotiate in good faith with the San Mateo Elementary Teachers Association, CTA/NEA, with respect to preparation time and length of the teachers' instructional day.

Dated: SAN MATEO CITY SCHOOL DISTRICT

By: _____
Authorized Representative

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